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The Use of Coerced Confessions in State Courts

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In this article Professor Spanogle examines the Supreme Court decisions in cases involving coerced confessions. He shows that the underlying basis of these decisions is not, as has been supposed, an attempt to protect accused persons from "outrageous" police conduct, but instead the prineiple that an accused has a right to refuse to disclose his guilt to police interrogators. The application of this principle, he says, calls for a subjective test, looking to the state of the accused's mind at the time the confession was made. He concludes by pointing out the state courts' failure to go beyond mere "color-matching" of factual situations, suggesting that this failure is possibly the result of the previously unclear definition of the basic principles involved.

It is now well settled that involuntary confessions must be excluded from evidence in all criminal trials in state courts. It has been difficult, however, to distinguish a voluntary confession from an involuntary one, because the term "involuntary" is not well defined. This lack of definition, which creates great problems for state trial and appellate courts in attempting to apply the rule to individual cases, has, in turn, stemmed from a lack of understanding of the reasons for excluding involuntary confessions. The United States Supreme Court has handed down thirty-four coerced confession cases, holding confessions admissible in some factual situations and inadmissible in others. The difficulties encountered by the state courts in defining "involuntary" have not been due to inconsistent decisions by the Court in individual cases, but rather to the absence of any clearly enunciated explanation of the purpose the Court seeks to achieve, or of the interests it seeks to protect, by excluding such evidence.[1] The failure of the state courts to understand the underlying rationale has led many of them to attenipt to color-match case fact situations, or to turn the whole matter over to the jury with the most general of instructions.[2] It has even led to calls to abandon the "involuntary" terminology as incapable of explaining the Court's present standard.[3]

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1. "Indeed, it seems fair to say that the whole modern history of the confession rule both in and out of the federal Supreme Court has been characterized by ambiguity as to what purposes the rule is intended to achieve and what interests it is designed to protect." Allen, *Due Process and State Criminal Procedures: Another Look*, 48 Nw. U.L. Rev. 16, 18 (1953).

2. See notes 160-62 *infra*.

3. "However, so long as future opinions continue to discuss the confessions problem

This article seeks to formulate a usable definition of "involuntary." Any discussion of the problems regarding involuntary confessions must, however, start with an examination of the reasons for excluding such evidence. Therefore this article will reexamine the rationale which has been previously accepted: that the Court is attempting to protect accused persons from "outrageous" police conduct. It will indicate how this test, which requires that police methods be judged objectively, fails to explain recent confession cases. It will then reexamine the Court's decisions to find their underlying reasoning and will use this reasoning to show that the Court is primarily interested in protecting the right[4] of the accused to refuse to disclose his guilt to a police interrogator. This examination will also show that the Court's present test is based on determining the defendant's probable state of mind at the time he confessed. The state of mind which requires exclusion of a confession will be the basis for a definition of "involuntary." If the accused's will to remain silent is overborne, because he *thinks* that further resistance to the interrogator's demands for a confession will be unavailing, the resulting confession is termed "involuntary." The article will also discuss briefly criteria and methods of analysis to be used in applying this definition of "involuntary," and will compare recent state court decisions with these criteria and methods.

I. THE PROBLEM

Confessions which were deemed involuntary were excluded from evidence at common law.[5] Wigmore argued that the only justification for excluding a confession from evidence was a finding that it was "untrustworthy as testimony."[6] According to traditional evidence theories, an untrustworthy confession would be inadmissible because it was incompetent.[7] However, such a theory also meant that only untrustworthy confessions could be termed involuntary, and that a confession would be excluded only if the interrogation tactics used

solely in terms of voluntariness, they will shed no more light on what has been done or what is to be expected than have past opinions." Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 429 (1954).

4. See text at notes 56 & 58 *infra*.

5. The King v. Warickshall, 1 Leach 263, 168 Eng. Rep. 234 (K.B. 1783).

6. "The principle, then, upon which a confession may be excluded is that it is, under certain conditions, *testimonially untrustworthy*. . . . [T]he essential feature is that the principle of exclusion is a testimonial one, analogous to the other principles which exclude narrations as untrustworthy." 3 WIGMORE, EVIDENCE § 822, at 246 (3d ed. 1940). "A confession is not excluded because of any *illegality* in the method of obtaining it . . . ." *Id.* § 823, at 249. "[T]he confession-rule aims to exclude self-criminating statemeuts which are *false* . . . ." *Id.* § 823, at 250.

7. *Id.* §§ 822-26.

were sufficiently coercive to induce a false self-accusation.[8]

However, in 1936 it became clear that the common law theory was not the only moving force in this area. The United States Supreme Court held that the due process requirement of a fair trial would also regulate a state's use of confession evidence.[9] Its first two decisions[10] could easily be squared with the common law untrustworthiness rationale, and no contrary rationale was suggested. But in 1941 it began to appear that untrustworthiness was not the only basis for a due process objection to the use of a coerced confession as evidence and therefore was not the sole rationale for the exclusionary rule. In *Lisenba v. California*[11] the Court stated that: "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, *whether true or false.*"[12]

In adding the prohibition against fundamental unfairness, the Court did not indicate what other considerations it found relevant to due process, nor what interests of the accused, other than the exclusion of false evidence, were to be protected against "unfairness"—it did not indicate *how* the common law definition of "involuntary" might be changed. It was obvious, however, that something in addition to untrustworthiness was important to the Court in considering confession evidence, and that an accused had some right under due process which extended further than the mere right not to have a false confession forced from his lips.[13] This right was sufficiently important to exclude evidence which was otherwise both relevant and competent. In other words, the Court had at least indicated that even a "guilty" accused person could claim some due process protection in confession cases. The question still remained: From what was he to be protected?

While the rationale of the due process protection was thus undefined, two things happened. First, in 1943 the Court held, in *McNabb v. United States*,[14] that in federal criminal trials confessions were to

8. *Ibid.* Inconsistent with such a theory, but not rejecting it, are the cases which excluded a coerced confession even though fruits of that confession had substantiated it. See 3 WIGMORE, *op. cit. supra* note 5, § 858, and cases cited therein.

9. Brown v. Mississippi, 297 U.S. 278 (1936).

10. Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, *supra* note 9.

11. 314 U.S. 219 (1941).

12. *Id.* at 236. (Emphasis added.)

13. This development may not have been obvious from the language in *Lisenba*. Confirmation was not long in coming, however. In Watts v. Indiana, 338 U.S. 49 (1949), the Court held that a confession could be inadmissible even though its validity was substantiated by its fruits. And in Rogers v. Richmond, 365 U.S. 534 (1961), it was held that if the probable truthfulness of a confession was the sole criterion taken into consideration in determining its voluntariness any resulting conviction must be reversed.

14. 318 U.S. 332 (1943).

be excluded if they had been obtained during a period of illegal detention. It was thought that one basis for this rule was to exert disciplinary control over federal officers to prevent "lawless law enforcement" by providing an indirect sanction against such conduct.[15] Second, the Court began deciding many state confession cases without explicitly examining the effect of the interrogation methods used on the particular defendant. Thus, in *Ashcraft v. Tennessee*,[16] decided a year after *McNabb*, thirty-six hours of continuous questioning was held "inherently coercive," in spite of evidence that the defendant had recovered from the effects of his interrogation at the time he confessed.[17] Subsequent cases also reversed convictions based upon confessory evidence without determining whether the interrogation methods used had compelled the defendant to make the confession.[18]

This abandonment of a search for a causal connection between police methods and the accused's act of confessing was thought to indicate that the effect of such methods on the accused was no longer important. Thus, most commentators concluded that the due process addition to the common law trustworthiness standard was an "objective" test, in which the conduct of the police was to be judged against some ideal or "civilized" standard, rather than a "subjective" test which considered the effect of such conduct on the accused and his probable powers of resistance.[19] (In this article, as has been

15. Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948). Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958), suggests that the primary rationale is different. This does not, however, change the fact that the commentators believed that the Court's primary purpose was the exertion of such disciplinary control. Nor does it mean that it was not at least an incidental purpose.

16. 322 U.S. 143 (1944).

17. *Id.* at 156, 165-67 (Jackson, J., dissenting).

18. See Malinski v. New York, 324 U.S. 401 (1945); Haley v. Ohio, 332 U.S. 596 (1948); Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Harris v. South Carolina, 338 U.S. 68 (1949).

19. The subjective-objective analysis became the standard tool for attacking state confession problems, and seems to have remained so. See, *e.g.*, Ritz, *Twenty-five Years of State Criminal Confession Cases in the U. S. Supreme Court*, 19 WASH. & LEE L. REV. 35 (1962); Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, in POLICE POWER AND INDIVIDUAL FREEDOM (Sowle ed. 1962); Inbau, *Restrictions in the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 77 (1957); Leibowitz, *Safeguards in the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 86 (1957); Maguire, *Involuntary Confessions*, 31 TUL. L. REV. 125 (1956); Paulsen, *supra* note 3; Allen, *supra* note 1; and Notes, 46 IOWA L. REV. 388 (1961); 26 TENN. L. REV. 291 (1959); and 37 B.U.L. REV. 374 (1957). This analysis has been used by authors who seek more protection for the accused, as well as by those who seek to reduce disciplinary control by the courts over the police. See Leibowitz, *supra;* Weisberg, *supra*. One author has noted, however, that the traditional subjective-objective dichotomy has not been used since Stein v. New York, 346 U.S. 156 (1953), and that the cases decided after 1953 reflect the use of a new kind of test. Comment, 50 J. CRIM. L., C. & P.S. 265, 271 (1959).

done in other articles in the field,[20] I shall use "objective" to refer to tests which judge the offensiveness of the police conduct without regard to its effect on the accused. I shall use "subjective" to refer to tests which relate to either the actual or the *probable* state of mind of the accused at the time he confesses. Even those "subjective" tests which consider probable states of mind are still primarily concerned with the effect of the interrogation on the accused and his probable ability to resist the interrogator. Thus, "subjective," as used in this field, does not necessarily correspond to its usage in other fields. For example, the common law trustworthiness test has traditionally been so termed even though it considers the probable, not the actual, effect of the interrogation on the accused.[21])

Further, the Court's use of "inherently coercive" appeared to indicate that certain state police methods would be presumed "unfair," just as the *McNabb* decision had held illegal detention of an arrestee by federal officers to be "uncivilized."[22] It was therefore assumed that an analogous rationale underlay the due process contribution to the coerced confession rule, and that the Court was attempting to exert disciplinary control over the state police as it had supposedly exerted such control over the federal police in *McNabb*.[23] Both state and federal police would be required to use "civilized standards." If the federal police could not obtain an admissible confession by violating federal statutory law, the state police could not violate due process and use the resulting confession.

The commentators[24] therefore concluded that an accused had two due process rights during police interrogation: (1) a right not to have a false confession used at his trial—the common law standard; and (2) a right not to be subjected to police conduct which itself violated due process. Only when the methods used by the police were "outrageous" or "uncivilized" were they said to violate due process.

> A confession should be *expressly* tested by two standards, "trustworthiness" and "police methods," and the standards should be applied independently of one another. If the danger of falsity is too great, *or* if the methods employed too outrageous, the conviction should be reversed.[25]

This theory is still the prevailing one today despite the express language of the Court to the contrary.

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20. See articles cited in note 19 *supra*.
21. See text at note 45 *infra*.
22. 318 U.S. at 340.
23. See especially Inbau, *supra* note 14; Douglas, *The Means and the End*, 1959 WASH. U.L.Q. 103, 113-14 (1959).
24. See authorities cited note 19 *supra*. Although the commentators reached this conclusion, the court itself does not seem to have adopted it. See note 59 *infra*.
25. Paulsen, *supra* note 3, at 431. See also, Ritz, *supra* note 19, at 57.

> The conclusion to be drawn is that while the Court still couches its opinions in terms of a factual inquiry into the state of the defendant's mind at the time of confessing, the Court has actually abandoned this approach. The Court is more concerned with the nature of the methods used by the police at the time the confession was obtained than with the effect those methods had on the particular individual.[26]

In the theory of the latter standard (hereinafter called the objective standard), the interest to be protected was the individual's interest in not being subjected to uncivilized police conduct, not his interest in excluding any statements procured by such conduct. Confession evidence was to be excluded primarily to deter the police from engaging in offensive conduct, not to protect any right of the individual in regard to *the use of* such evidence at his trial. Under this theory, the Court was exercising disciplinary control over the state police, not protecting the *fair trial* rights of the individual accused. Once the accused's rights had been divided and isolated in this manner, analysis of the problems in this area concentrated on the constitutionality, propriety, and usefulness of the Court's exercise of disciplinary control over state police.[27]

It is becoming increasingly apparent, however, that neither the common law standard nor the objective standard explains the decisions of the Supreme Court in the majority of recent state coerced confession cases. First, the Court's language indicates that it believes it is protecting some fair trial right of the individual defendant, rather than generally supervising the various state police. It would therefore seem more relevant to ascertain what right of the accused is being protected than to discuss the supposed lack of constitutional foundation, etc., for supervision of state police. Second, the most recent decisions of the Court cannot be explained as attempts either to exclude false evidence or to discipline the state police, for neither does the evidence appear false nor was the police conduct uncivilized. Thus, the common law and objective standards do not seem to furnish an accurate definition of "involuntary," as that term is presently used by the Court.

Yet the state courts need a definition which is accurate and somewhat definite. State court use is the ultimate test of any legal theories in this area. Otherwise, the Court's standard will be applied only in those few cases which the Court itself can review. The failure of the Court to make itself understood is vividly shown by the surprise of a Pennsylvania Superior Court upon discovering, in 1962, that the common law untrustworthiness standard was insuffi-

26. Ritz, *supra* note 19, at 42-43.

27. An example of a debate on such problems is shown in the exchange between Inbau, *supra* note 19, and Leibowitz, *supra* note 19. See also Ritz, *supra* note 19.

cient.[28] But the state courts which have followed the objective standard have fared little better. Some have been led on a wild goose chase, attempting to color-match case factual situations; others have resorted to formulating a list of prohibited police practices, the presence of which invalidates a confession, but whose absence automatically makes a confession admissible.[29] Thus, the Court's decisions should be reexamined to see whether it is endeavoring to protect rights and interests other than those protected by the common law and objective standards, and, if so, to see how this may change the definition of "involuntary."[30]

II. A Different Rationale as a Solution

The first question to be answered is: How has the objective standard been insufficient to explain the recent Supreme Court decisions? Only then can we answer the question: What standard is the Court using? The insufficiency of the objective standard is shown by examination of the results of some cases, of the types of evidence which the Court considers important, of the language used by the Court to explain its holdings, and even of the common usage meaning of the word "involuntary."

A primary example of the inability of the objective standard to explain the results of the Court's decisions is *Gallegos v. Colorado*.[31] There, a fourteen-year-old boy admitted, immediately after he was arrested, that he had committed an assault and robbery. He was then placed in a state juvenile hall, without being taken before a magistrate, and was detained there in semi-isolation for five days.[32] At the end of that time he signed a second and formal confession which was used at his trial.[33] There was no prolonged questioning of

28. Commonwealth v. Williams, 197 Pa. Super. 184, 176 A.2d 911 (1962). This decision was handed down after the Supreme Court decisions in Rogers v. Richmond, 365 U.S. 534 (1961), and Culombe v. Connecticut, 367 U.S. 568 (1961).

29. See text accompanying notes 165 & 171-72 *infra*.

30. For instance, a comparable problem arises in contract law in determining the presence of duress. Duress is usually said to be present if one party's consent was coerced or involuntary. Yet, "the test of what act or threat produces the required degree of fear is not objective." Restatement, Contracts § 492, Comment *a* (1932). See also authorities cited in notes 125 & 151 *infra*.

31. 370 U.S. 49 (1962). [Hereinafter referred to simply as the *Gallegos* case, to be distinguished from Gallegos v. Nebraska, 342 U.S. 55 (1951)].

32. Defendant was kept apart from other inmates in a separate "unit," except for meals. He was kept out of the institution's school and recreational programs. Within his isolation unit, he had access to any other inmates who had also just arrived, and who were also being kept out of the programs. Normally, this semi-isolation lasted only twenty-four hours, but persons charged with serious offenses, such as assault, might remain in it longer. Record, pp. 272-75, Gallegos v. Colorado, *supra* note 31.

33. After defendant made the written second confession, the victim of the assault died; defendant was then charged with murder rather than robbery. 370 U.S. at 50.

the defendant, but his mother was not allowed to see him. The Court held that his written, second confession had been coerced, and that its use at his trial violated his right to due process. There was no question as to the trustworthiness of the confession, and the Court did not bother to discuss the point.[34] The decision was therefore not based upon an application of the common law standard, but must rest upon whatever due process standard the Court has added.

The objective standard would exclude this confession only if it could be said that the methods used by the police violated due process. Under the normal formulation of the rule, the methods themselves must be sufficiently "outrageous" or "uncivilized"[35] as to offend due process before the police are to be disciplined by excluding the confession. Yet the Court did not term the treatment of the boy as either outrageous or uncivilized, and it would be hard to use such epithets without a wholesale denunciation of the Colorado Juvenile Halls.[36] Thus, it is apparent that the Court is requiring the state police to adhere to a higher standard than the objective standard, as normally formulated, would require.

Even if the objective standard is revised to require exclusion of confessions whenever there is any violation of any preferred procedural standards (asserted by some to be constitutional rights), it would not explain the result in this case. The Court stated that there was no prolonged questioning of the defendant, nor were other third degree methods involved. Defendant was warned of his right to remain silent and to have the advice of counsel or his parents. The defendant *was* detained before appearing before a magistrate, and the coerced second confession was procured during this detention. Also, the defendant was not furnished an attorney and was cut off from other adult advisors. Thus, the only violations of preferred procedural standards

34. The prosecution argued a variant of this theme, stating that the detention was irrelevant because the allegedly coerced confession was substantially the same as the oral first confession, which had been made at arrest and before any detention. Compare United States v. Mitchell, 322 U.S. 65 (1944). The Court stated that such an argument was "in callous disregard of this boy's constitutional rights," and dismissed it without further discussion. 370 U.S. at 54.

35. Paulsen, *supra* note 3, at 431. Both the concept of the objective standard and the term "outrageous" seem to be derived from the "shock the conscience" test of Bochin v. California, 342 U.S. 165 (1952). This would seem further reason to question their present validity. See Mapp v. Ohio, 367 U.S. 643 (1961).

The term "uncivilized" is derived from McNabb v. United States, 318 U.S. at 340, and the assumption made that if the federal police must be civilized, so also must the state police.

36. The superintendent of the particular juvenile hall testified that defendant was treated no differently than any other boy. Record, p. 274, Gallegos v. Colorado, *supra* note 31. This would eliminate any possibility that the police detained the defendant for the purpose of obtaining a confession, thus making an allegation of uncivilized police conduct even more difficult to sustain.

which the defendant could claim were that he was illegally[37] detained and that he was not furnished counsel during that detention. But the Court has not yet declared that every confession made during an illegal detention is inadmissible.[38] Nor has it stated that every confession made while a defense attorney is not present has been coerced.[39] Nor was *Gallegos* decided on either basis.[40] Even in the latest confession case, subsequent to *Gallegos*, the Court said only that these violations were "attendant circumstances" which must be considered in determining voluntariness.[41]

Thus, neither the normal formulation of the objective standard, nor any modification of that standard, is able to explain the result of this case. And the reason for this inability points up the most serious defect in any analysis based upon the objective standard. In any such analysis we are forced to ignore that fact which the Court considered to be the most important to the case—the youth of the defendant. The objective standard, by its own definitions[42] does not depend upon the effect of the interrogation upon the individual accused, but only upon the relationship between the police conduct and due process rights—the type of person being interrogated and his ability to resist police interrogation pressure are irrelevant.

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37. It is possible that his detention was not illegal since its legality was never challenged by the defense attorney. However, COLO. REV. STAT. ANN. § 22-8-7 (1953) requires that any juvenile arrested with or without a warrant be brought "directly" before a county or juvenile court, rather than a police magistrate. No time limit for this appearance is specified, but the "directly" requirement should preclude side-trips for interrogation. COLO. REV. STAT. ANN. § 39-2-3 (1953), the general statute on commitment of arrestees, sets no requirements as to when an arrestee is to be brought before a magistrate.

38. In both Gallegos v. Nebraska, 342 U.S. 55 (1951), and Culombe v. Connecticut, 367 U.S. 568 (1961), the Court expressly stated that it would not so rule. See Part III B *infra*.

39. See the dissenting opinions in Crooker v. California, 357 U.S. 433 (1958), and Cicenia v. LaGay, 357 U.S. 504 (1958). In each case, the argument that due process requires the presence of counsel during interrogation, at least when counsel is demanded, was rejected. See also text accompanying note 109 *infra*.

40. The four dissenters in Crooker v. California, *supra* note 39, formed the majority in Gallegos v. Colorado, *supra* note 31, but were careful not to mention either *Crooker* or Cicenia v. LaGay, *supra* note 39. Instead of emphasizing the absence of an attorney, the Court emphasized the youth of the defendant and the lack of "adult advice" in general. 370 U.S. at 54. Further, in summing up its reason for reversal, the Court cited the totality of the circumstances, and took care not to say that any one circumstance would have required a reversal: "The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend—all these combine to make us conclude that the formal confession on which this conviction may have rested was obtained in violation of due process." *Id.* at 55. *Cf.* King, *Developing a Future Constitutional Standard for Confessions*, 8 WAYNE L. REV. 481 (1962); Note, 76 HARV. L. REV. 108 (1962).

41. Haynes v. Washington, 373 U.S. 503, 517 (1963).

42. See Ritz, *supra* note 19, especially at 43-51; and Paulsen, *supra* note 3.

However, it is apparent that these factors not only are relevant, but are quite important, to the Court. In *Gallegos* the fact that the defendant was a fourteen-year-old boy was necessary to the decision that his confession was involuntary. The Court indicated that similar treatment of an adult would not have produced an involuntary confession.[43] In many other cases the Court has made distinctions between types of defendants. Thus youths, members of minority races, the uneducated, the insane, and the inexperienced in crime have been granted special protection, and the Court has applied different and more rigorous standards to determine the admissibility of confessions made by these types of defendants.[44] Under the objective standard, none of these facts would have been considered. Since these factors are important to the Court, it is apparent that the Court is using some form of subjective test—a test which depends upon the effect of the interrogation methods on the accused, which effects may vary with different types of individuals. Thus, the Court, in deciding confession cases, is searching for the state of mind of the defendant during the interrogation and at the time he confessed.

Yet, as the commentators have correctly pointed out,[45] the Court is not concerned with the actual reaction of the particular individual in the case before it. Instead, the Court is in effect creating presumptions as to the breaking point of different types of people.[46] The Court must operate in this way, because it cannot determine the defendant's actual state of mind. The accused can always say he confessed only because he was scared, etc.[47] On the other hand, the state can claim

43. "He (the defendant) cannot be compared with an adult in full possession of his sense and knowledgable of the consequences of his admissions." 370 U.S. at 54. "Without some adult protection against this inequality, a 14-year old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights." *Id.* at 54-55.

44. Lynumn v. Illinois, 372 U.S. 528 (1963) (woman, inexperienced in crime); Culombe v. Connecticut, 367 U.S. 568 (1961) (mentally retarded); Blackburn v. Alabama, 361 U.S. 199 (1960) (insane Negro); Spano v. New York, 360 U.S. 315 (1959) (ignorant Italian immigrant); Payne v. Arkansas, 356 U.S. 560 (1958) (illiterate nineteen-year-old Negro); Fikes v. Alabama, 352 U.S. 191 (1957) (illiterate Negro); Harris v. South Carolina, 338 U.S. 68 (1949) (illiterate Negro); Haley v. Ohio, 332 U.S. 596 (1948) (fifteen-year-old Negro); White v. Texas, 309 U.S. 631, *reversing* 128 S.W.2d 51 (Tex. Crim. App. 1939) (illiterate Negro). *Cf.* Gallegos v. Nebraska, 342 U.S. 55 (1951) (illiterate Mexican).

45. See note 19 *supra.*

46. Technically, this does not seem to be an inference, because it is not possible to deduce the accused's state of mind by logical rules. See MORGAN, BASIC PROBLEMS OF EVIDENCE 31 (1961). Nor has the Court endeavored to use rigorous logic. Whether the presumptions are conclusive or rebuttable has not yet been tested. But see the discussion of *Ashcraft* in the text accompanying note 17 *supra.*

47. E.g., Testimony of Robert Gallegos:

Q. "[W]hat was the reason you gave those answers [confessions]?"

A. "I was scared that if we didn't do it they would keep us in security longer."

that the jury rejected this testimony when it returned a guilty verdict.[48] Thus, the Court must discover this state of mind from the objective facts concerning the defendant's treatment, rather than from his self-serving declarations. This means creating a standard based on the probable effect of specified interrogation techniques on the mind of a particular type of defendant. There is nothing new in such a procedure. It was used at common law to determine the trustworthiness of a confession (which has always been termed a subjective standard, because it considers the accused's probable state of mind).[49] As Wigmore stated: "It must be remembered that no attempt is ever made to investigate the *actual* motives of the person confessing, or the part played by the inducement among other motives. The whole theory of inducements rests on the *probable* effect, not the actual effect, upon the person."[50] Thus the Supreme Court can use a subjective standard without investigating the individual defendant's actual reactions to the interrogation techniques used. It can instead determine a presumptive state of mind from the objective facts concerning the length, etc., of the interrogation. And, as long as the Court is using a subjective standard, analysis under an objective standard will be unable to define "involuntary" correctly.

If the Court is concerned with the effect of an interrogation on the accused, the question still remains: What is an impermissible effect on him? Another way to ask the same question is: What interest of an interrogated person is of sufficient constitutional value to warrant protecting it by excluding any confession procured by an

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Record, p. 164, Gallegos v. Colorado, *supra* note 31.

Q. "And did you sign it Robert?" A. "Yes, sir, I signed it because he said whether we told the truth or didn't tell the truth he was going to send us to the Industrial School." *Id.* at 163.

48. The Court limits itself to examining "undisputed facts." Malinski v. New York, 324 U.S. 401, 404 (1945). This is because it is reviewing a finding of fact. Presumably, it would be possible for the Court to say that any such declaration is undisputed in that the interrogators did not state that the defendant did not look scared, or even if they did, they could not know he was not scared. *Compare* Haynes v. Washington, *supra* note 41, at 507-13 (1963), *with* Blackburn v. Alabama, *supra* note 44. Any such line of reasoning would, of course, be impractical because any false claim of coercion, no matter how obviously unfounded, would require exclusion of the confession. The Court must therefore regard such declarations not ouly as disputed, but also as rejected by the jury.

This does not mean, however, that the Court may not review the issue of voluntariness of confessions. *Cf.* Ritz, *supra* note 19, at 51-66. "In this sense the Court is not deciding the fact of voluntariness; it is applying a constitutional standard of probability." Paulsen, *supra* note 3, at 434.

49. See text following note 20 *supra* and authorities cited at note 19 *supra*.

50. 3 WIGMORE, EVIDENCE § 853, at 333 (3d ed. 1940). See also Culombe v. Connecticut, *supra* note 44, at 603; Ashcraft v. Tennessee, *supra* note 16. In *Ashcraft* both the majority and the dissent agreed that proof of the actual effect of the interrogation on the defendant was not necessary. *Id.* at 154, 160. And see MAGUIRE, EVIDENCE OF GUILT 127, 134 (1959).

interrogation which violates that interest? The most obvious place to look for an answer to such questions is the language the Court has used to explain its decisions in the confession cases. This language has not always been clear,[51] but it may provide sufficient clues.

The Court has usually stated that it was searching for a state of mind. A typical formulation of the type of state of mind which the Court feels is determinative is found in *Lyons v. Oklahoma*: "The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or to deny a suspected participation in a crime."[52] And in *Reck v. Pate*: "The question in each case is whether a defendant's will was overborne at the time he confessed."[53] This language was thought to relate only to the trustworthiness standard and therefore was interpreted to mean that "voluntariness" depends upon whether the circumstances were such that the defendant was compelled to make an untrue confession. Thus, "mental freedom to confess or not" has been equated with "mental freedom to make a *true* confession or not."[54] Through this reasoning the above language has been thought to concern only the common law untrustworthiness standard. But such an interpretation is not required. The language is at least equally susceptible to the interpretation that a confession is "involuntary" if the accused's will not to give *any* confession, true or false, but to remain silent or lie, is overborne.

This type of language has also been used in situations where the veracity of the confession was not in issue. In *Watts v. Indiana*,[55] the confession was substantiated by its fruits but was still held inadmissible. The Court stated that the type of interrogation implied "that it is better for the prisoner *to answer*" (not: to answer falsely) "than to persist in the *refusal of disclosure which is his constitutional right.*"[56] This was because a confession (not: a false confession) "could not be extorted in open court."[57] Thus the Court has stated that it is protecting an interest of the individual accused in not having to answer a police interrogator at all, rather than a more limited interest in not having to answer with a false self-accusation. It has protected

51. See note 1 *supra*.
52. 322 U.S. 596, 602 (1944).
53. 367 U.S. 433, 440 (1961). Lynumn v. Illinois, *supra* note 44; Haynes v. Washington, *supra* note 41. "[T]he concept of voluntariness is one which concerns the mental state, there is the imaginative recreation, largely inferential, of internal 'psychological' fact." Culombe v. Counecticut, *supra* note 44, at 603.
54. See, *e.g.*, Ritz, *supra* note 19, at 41-42, quoted in text at note 26 *supra*.
55. 338 U.S. 49 (1949).
56. *Id.* at 54. (Emphasis added.)
57. *Ibid.*

this interest by giving the accused a "constitutional right"[58] to "refuse to disclose" *his guilt.*[59] The similarity of this right to remain silent to the fifth amendment privilege against self-incrimination is obvious. One was devised to protect against the ancient abuse of judicial inquisition, the other against the modern abuse of police interrogation.

The Court itself has expressly made such a comparison. In *Gallegos v. Colorado*[60] the Court stated that there are two due process requirements which influence the determination of confession cases. The first requirement is that the defendant be given a fair trial, free from the use of constitutionally objectionable evidence. The second requirement, which defines the type of evidence which is objectionable in confession cases, is that the defendant be free from "the element of compulsion which is condemned by the Fifth Amendment."[61] The latter requirement must mean that the defendant possess not only the mental freedom to confess or deny participation in a crime truthfully, but also that he be free to confess, or lie, or stand mute if he desires, whether guilty or not.[62]

58. It is not sufficient to state that no such constitutional right is needed because the police are not entitled to answers to their questions. Weisberg, *supra* note 19, at 161. Although the police have no legal power to compel testimony, they do at times have, or appear to have, the physical power to do so. Thus, a right to refuse to disclose guilt is needed to protect the accused against use of testimony compelled by this physical power. Any lesser protection would be a mere form of words, especially in view of the general failure to warn the accused that he need not answer questions.

59. This conclusion does not ignore the fact that in some cases the Court has used langnage indicating that there are other objectives which are furthered by excluding involuntary confessions. *E.g.*, "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Spano v. New York, *supra* note 44, at 320-21; Blackburn v. Alabama, *supra* note 44, at 207.

However, this objective should be regarded as ouly an incidental benefit of the exclusion of the confession. When the final determination of each case was made, the Court clearly based this determination on the defendant's state of mind. "We conclude that petitioner's will was overborne." Spano v. New York, *supra* note 44, at 323. "[T]he effect of such massive official interrogation must have been felt." *Id.* at 322. "[T]he evidence here clearly establishes that the confession most probably was not the product of any meaningful act of volition." Blackburn v. Alabama, *supra* note 44, at 211. See also note 62 *infra.*

60. *Supra* note 30.

61. *Id.* at 51.

62. This also must be the point of Mr. Justice Frankfurter's oft-expressed comparison of the accusatorial and inquisitorial systems. See Watts v. Indiana, *supra* note 55; Rogers v. Richmond, 365 U.S. 534, 541 (1961). He is not speaking of the inquisition of the middle ages, but of the modern French practices. For a discussion of the "inquisitorial system" he cites Keedy, *The Preliminary Investigation of Crime in France,* 88 U. PA. L. REV. 692 (1940). Further, the system cited allows judicial interrogation, but only by a disinterested judge in the presence of counsel. Watts v. Indiana, *supra* note 55, at 55. It would seem both systems attempt to eliminate false confessions and "uncivilized" police conduct. Keedy, *supra.* Thus Frankfurter is advocating neither the trustworthiness standard nor the objective standard.

An involuntary confession may, therefore, be defined as one which has been procured from an accused by overcoming his will to remain silent or to deny guilt. Use of such a confession in a state criminal trial violates the above combination of his federal constitutional rights, and requires reversal of any conviction so obtained. First, reversal is required because the use of constitutionally objectionable evidence violates his right to a fair trial. Second, the confession is constitutionally objectionable because it has been obtained in violation of his right to refuse to disclose guilt. This right of nondisclosure is a due process right which is analogous to, but not dependent upon, the Fifth Amendment right against self-incrimination. This means that even though the policies behind the two rights are similar, the authority for and content of each right is different.[63]

The analogy between the definition of "involuntary" and the fifth amendment is not a recent legal development. It was stated by the Supreme Court as long ago as 1897, in *Bram v. United States*.[64] *Bram* involved a federal prosecution but was decided long before the imposition of the *McNabb* rule, at a time when confessions used in federal trials were excluded solely for involuntariness. The Court's definition of involuntariness in that case was:

> In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that

But an essential difference between the two systems is the inclusion of the fifth amendment privilege in the accusatorial system. This is the only meaningful interpretation of the phrases: "Under our system, society carries the burden of proving its charge against the accused not out of his own mouth." Watts v. Indiana, *supra* note 55, at 54. "It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation." *Ibid.* And see also: "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." Fikes v. Alabama, 352 U.S. 191, 197 (1957); Stein v. New York, 346 U.S. 156, 185 (1953).

63. Even the McNaughton revision of Wigmore admits that the principles behind the two rules are the same. 8 WIGMORE, EVIDENCE § 2266 (McNaughton rev. 1961).

64. 168 U.S. 532, 542 (1897). The idea is not a new one to commentators, especially evidence professors. See MCCORMICK, EVIDENCE 154-57 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 129-31 (1st ed. 1954); McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 446, 451-54 (1938); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 27-30 (1949). Nor is this idea new to state courts. See Abston v. State, 139 Tex. Crim. 416, 141 S.W.2d 337 (1940); cases cited in Morgan, *supra*, at 28 n.104. The principle is also recognized in the state court cases which allow involuntary confessions to be used to impeach the defendant's testimony as a witness. The rationale of such cases is that the defendant has waived his privilege against self-incrimination by taking the witness stand. See cases cited in Annot., 89 A.L.R.2d 478, 492-95 (1963). Such a rule would be of questionable validity under the analogy suggested herein, because waiver rules would not necessarily be applicable to fair trial rights. See note 69 *infra*. See also McNabb v. United States, 318 U.S. 332, 347 (1943) (Reed, J., dissenting); *In re* Fried, 161 F.2d 453, 465 (2d Cir. 1947) (L. Hand, J., concurring).

> no person 'shall be compelled in any criminal case to be a witness against himself.'[65]

When the Court began to require the exclusion of involuntary confessions from state criminal trials, it would seem reasonable to believe that this definition of "involuntary" was made applicable to confessions used in state trials also.

The Court's use of the fifth amendment analogy does not in any way imply that the amendment now applies to the states. Direct application of the fifth amendment to exclude involuntary confessions would not be necessary or feasible or helpful. The Court is merely refusing to allow police officers of the states to question an accused secretly and at great length without judicially administered supervision and safeguards. This says nothing about the ability of a state to withdraw the privilege against self-incrimination and still allow judicial interrogation with all of its safeguards. Thus, it is not necessary to overrule *Twining v. New Jersey*[66] or *Adamson v. California*,[67] and the Court so stated in *Gallegos*.[68] Nor would such a direct application of the fifth amendment enhance the protection of the accused's right to refuse to disclose his guilt because of that amendment's technical limitations, especially the waiver doctrine, which can apply without a warning.[69]

Use of an analysis based on the right to refuse to disclose solves many of the problems created by analysis under the objective standard. First, it explains the results reached by the Court. It establishes a stricter standard than merely requiring the police to refrain from outrageous or uncivilized conduct. Less forceful interrogation techniques may coerce an accused to break his silence or admit he has been lying.[70] On the other hand, not every violation of a preferred

65. *Ibid.*

66. 211 U.S. 78 (1908).

67. 332 U.S. 46 (1947).

68. "But the question of the right of the state to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter." 370 U.S. at 51-52, quoting Brown v. Mississippi, 297 U.S. 278, 285 (1936).

But see the arguments before the Supreme Court in Malloy v. Hogan, 32 U.S.L. WEEK 3309 (U.S. 1964). There the parties correctly recognized that there is a connection between the privilege against self-incrimination and the coerced confession cases. However, in view of the language quoted above, the prosecution would seem to have been mistaken in conceding that that privilege itself was used to exclude such confessions from state trials. *Id.* at 3310. A different, even though analogous, right is involved in confession cases. Thus these cases do not disturb *Twining* or *Adamson* in any way.

69. For a discussion of the limitations of the direct use of the fifth amendment in the coerced confession area, see Note, 5 STAN. L. REV. 459 (1953).

70. See text accompanying notes 166-70 *infra*. See also Bram v. United States, *supra* note 64.

procedural standard or asserted constitutional right will require exclusion of a confession, for it may not be sufficiently oppressive to compel the accused to speak against his will. Second, under a right-of-nondisclosure test, the Court may consider evidence concerning the personal characteristics of the accused. Police conduct which might not have any coercive effect on an experienced criminal may well frighten a child into confessing.

This analysis also has incidental benefits. First, it provides a solid constitutional foundation for the exertion of federal review of state trials. The suggested standard is the product of two due process requirements—first, that constitutionally objectionable evidence cannot be used in a fair trial, and second, that an involuntary confession is constitutionally objectionable.[71] Thus federal review, as well as the exclusionary rule, is based on the combination of two federally protected rights—the right to a fair trial and the right to refuse to disclose guilt. Both of these rights relate to the individual accused and the protection of his interests. Disciplinary control of the state police is not directly involved,[72] although it may follow as an incidental result. Second, admissions and exculpatory statements would be covered, as well as confession, because the right of nondisclosure includes the right to remain silent and not make statements of any kind. Therefore, any involuntary declaration, inculpatory or not, is procured in violation of the right to remain silent.[73]

III. PROBLEMS IN APPLYING THE DEFINITION

A. *Questioning Is Allowed*

The Court's use of the fifth amendment analogy does not, however, solve all of the problems involved in defining "involuntary." If it can

71. See text accompanying notes 59-60 *supra.*

72. *Cf.* Inbau, *Restrictions in the Law of Interrogation and Confessions,* 52 Nw. U.L. REV. 77 (1957). Thus, perhaps it is not true that "the ultimate test of the exclusionary rules is whether they deter police officials from engaging in objectionable practices." Allen, *Due Process and State Criminal Procedures: Another Look,* 48 Nw. U.L. REV. 16, 34 (1953). At least, perhaps this is not the ultimate test of the rule excluding involuntary confessions. If this rule seeks primarily to protect the individual, and only incidentally to deter police conduct, the ultimate test is whether the individual whose right of nondisclosure has been violated can exclude the involuntary confession at his particular trial.

73. For further discussion of such problems see Note, 5 STAN. L. REV. 459, 461-63 (1953). Wigmore insisted that the common law rule applied only to confessions, not to exculpatory statements, or even to admissions. 3 WIGMORE, EVIDENCE § 821 (3d ed. 1940). The Court has not yet ruled on this point under the fourteenth amendment, Ritz, *Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court,* 19 WASH. & LEE L. REV. 35, 36-37 (1962), but it has applied the rule to both admissions and confessions introduced in federal courts. Bram v. United States, *supra* note 64, at 562; Wilson v. United States, 162 U.S. 613, 621-22 (1896).

now be said that the accused has a right to refuse to disclose his guilt, what is the nature of that right? There are at least three possible interpretations of the practical nature of such a right: (1) If an accused has a right of nondisclosure of guilt, the police may not seek his aid in formulating their case against him. (2) The police may question the accused, but may not use any psychological pressure tactics to overcome any initial reluctance to confess if he does not cooperate fully. (3) The police may use some limited forms of such pressure tactics.

Under the first interpretation, the police could not interrogate or question[74] an accused at all. It would be possible to support this argument by some of the broader language of the Court which states that the accusatory system does not permit the accused to be convicted out of his own mouth. But the Court has indicated many times that it is not troubled by interrogation itself, but only by police abuses of this device. In the latest confession case, Mr. Justice Goldberg restated the Court's attitude: "And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement."[75]

Thus, the Court recognizes that a balancing of interests is involved in this problem, as it is in the protection of most other individual rights under the fourteenth amendment. A comparison must be made between the individual's interest in maintaining his freedom of action and the interest of society in maintaining peace and order.[76] The fact

74. Any questioning of a person who is suspected of or implicated in a criminal act is, by definition, an interrogation. U.S. DEP'T OF ARMY, FIELD MANUAL 19-20, CRIMINAL INVESTIGATION 36 (1951). Therefore, any questioning of an accused, no matter how polite, is termed an interrogation. Questioning of persons not suspected or implicated in a crime is termed an interview.

75. Haynes v. Washington, 373 U.S. 503, 515 (1963). See Culombe v. Connecticut, 367 U.S. 568 (1961). "And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions . . . . [S]uch questioning is often indispensible to crime detection. Its compelling necessity has been judicially recognized as its sufficient justification, even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths." *Id.* at 571. "The principle of the Indian Evidence Act which excludes all confessions made to the police or by persons while they are detained by the police has never been accepted . . . in this country. . . . Rather, this Court . . . and the courts of all the states have agreed in holding permissible the receipt of confessions secured by the questioning of suspects in custody. . . ." *Id.* at 588-90. *Accord,* Crooker v. California, 357 U.S. 433, 441 (1958); Cicenia v. LaGay, 357 U.S. 504, 509 (1958).

76. Spano v. New York, 360 U.S. 315, at 315 (1959). The primary examples of the use of such a weighing process are the decisions involving the protection of first amendment rights. See Barrett, *Personal Rights, Property Rights, and the Fourth Amendment,* 1960 SUP. CT. REV. 46, 63.

that there is such a weighing process is forgotten by those who insist that the Constitution requires absolute freedom from any police interference, at least until after the police have an iron-clad case. Individuals also have a communal right to be safe in their homes and on the streets, and this right is enhanced by the apprehension and conviction of criminals. And the Court has agreed that the police have a persuasive case that interrogation of suspects is "an *essential* tool" in their effort to maintain peace and order in the community.[77] This means that the police do not violate the Constitution when they question an accused to seek his aid in formulating their case. Therefore, any definition of "involuntary" must allow at least some limited form of interrogation of an accused.

B. *McNabb-Mallory Is Not Required*

A second method of urging that the state police be not allowed to interrogate an accused person is the argument that the Constitution requires the imposition of the present federal rule on the states.[78] In all federal criminal trials the court must exclude from evidence any confession which has been obtained during an unnecessary delay between the defendant's arrest and his first appearance before a magistrate (hereinafter called "arraignment" because this has been the standard terminology in previous discussions of the rule by both courts and commentators[79])—the *McNabb*[80]*-Mallory*[81] rule. The rule is based upon the federal procedural requirement that an arrestee be arraigned "without unnecessary delay."[82] Failure of the federal police to do so is, therefore, unlawful conduct, and evidence which is an outgrowth of unlawful conduct may not be used in federal courts.[83]

Most states have similar statutory rules, requiring the police to bring arrestees before a judicial officer without unnecessary delay.[84]

77. The language is from Haynes v. Washington, *supra* note 75, and is quoted there. The arguments for the necessity of interrogation are well stated in Inbau, *supra* note 72. That its necessity is recognized is shown by the authorities cited at note 75 *supra*.

78. For a discussion of the effect of illegal detention on the right to refuse to disclose guilt see text accompanying notes 141-42 & 170 *infra*.

79. See Goldsmith v. United States, 277 F.2d 335, 338-39 n.2a (D.C. Cir. 1960).

80. McNabb v. United States, 318 U.S. 332 (1943).

81. Mallory v. United States, 354 U.S. 449 (1957).

82. FED. R. CRIM. P. 5. The statute contains no specific language as to the effect of its violation upon the admissibility of evidence. For a discussion of the "legislative intent" behind its enactment, see Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948).

83. This is the rationale persuasively argued by Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958). They argue that the Court, in imposing the *McNabb-Mallory* rule, was primarily attempting to protect the federal judiciary from the corrosive influences of tainted evidence, rather than to punish the federal police for lawlessness. *Id.* at 30-33.

84. For a list of such statutes see McNabb v. United States, 318 U.S. 332, 342-43 (1943).

It would therefore seem possible that the same reasoning might be applied, so that all confessions obtained by state officers during illegal detentions would be excluded from state criminal trials. Many authors have suggested that the Supreme Court should require this of the states,[85] and that *Mapp v. Ohio*[86] compels such a ruling. They believe that imposition of the *McNabb-Mallory* rule on the states would eliminate interrogations by eliminating delays between arrest and arraignment. If arrestees are promptly arraigned, they will supposedly have immediate access to counsel, who will of course tell them to keep quiet, making interrogation useless. Also they will supposedly be immediately bailed from custody, making interrogation impossible.

Unfortunately, this argument ignores the fact that arraignment, bail, and an attorney are not always immediately available even in the best of legal systems. There are situations in which long delays in arraigning arrestees are necessary.[87] Also, not all defendants can make bail immediately—or even make bail at all—and not every attorney enters his client's case during the first appearance before a magistrate.[88] At least, the argument runs, the arrestee will be warned as to his rights by the magistrate. But a warning is useless unless it is understood, and being told "It-is-my-duty-to-warn-you-that-you-have-a-right-to-the-aid-of-counsel-and-to-remain-silent-but-anything-you-say-may-be-used-in-evidence-against-you" by a hostile committing magistrate who feels that the local police are being unreasonably hampered in the performance of their duties would scarcely be helpful even to a professor of criminal law.[89] Imposition of the *McNabb-Mallory* rule on the states should not, therefore, be regarded as a panacea which will eliminate all involuntary confession problems. At best it helps some arrestees and shifts the problems to the post-arraignment period. As

85. Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 564-94 (1963); Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185, 201 (1961); Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. ILL. L.F. 78; Comment, 1 CATHOLIC U.L. REV. 1 (1950); Note, 24 GA. B.J. 120 (1961).

86. 367 U.S. 643 (1961).

87. For examples of such situations see Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509, 631-32 (1949). Prevention of the disappearance of accomplices is a primary example of a necessary reason for sometimes protracted delay. See also Comment, 68 YALE L.J. 1003, 1013-20 (1959).

88. See, *e.g.*, SPECIAL COMMITTEE OF THE NEW YORK CITY BAR ASS'N, EQUAL JUSTICE FOR THE ACCUSED 67 (1959); N.J. ADMINISTRATION OFFICE OF THE COURTS, REPORT ON THE ASSIGNED COUNSEL SYSTEM 6 (1955). These reports indicate that for indigent defendants delays of two to three months between arrest and appointment of counsel are typical.

89. See Haley v. Ohio, 332 U.S. 596, 601 (1948); Rothblatt & Rothblatt, *Police Interrogation: The Right to Counsel and to Prompt Arraignment*, 27 BROOKLYN L. REV. 24 (1960).

the federal courts have learned, it does not eliminate the necessity for an accurate definition of "involuntary."[90]

A Supreme Court ruling that the *McNabb-Mallory* rule is constitutionally required of the states would, however, have a great effect on its review of state confession cases and would probably affect the Court's definition of "involuntary."[91] It is therefore necessary to examine the arguments to see whether such a ruling is required. There are at least three lines of argument that *Mapp* compels the *McNabb-Mallory* rule to be enforced in state criminal trials. The first argument is based on the belief that *Mapp* generally precludes "lawless law enforcement" by state officers, and requires the exclusion of all evidence procured through violations of state statutes. The second argument is that *Mapp* declares that every due process right must be effectively protected by the courts.[92] It then finds a due process right to a prompt arraignment, and finds that this right can be protected only by the *McNabb-Mallory* rule. The third argument also starts from the premise that *Mapp* declares that every due process right must be afforded effective protection. However, the due process right which this argument seeks to protect is the arrestee's right to refuse to disclose his guilt.

It should first be made clear that the Court, when deciding *Mapp*, did not believe that its rationale compelled the imposition of *McNabb-Mallory* on the states. The fourteenth amendment confession cases are cited with approval to show that *Mapp* is merely raising the protection against search and seizure up to a level previously attained in the confession cases.[93] The confession cases had already determined that involuntary confessions should be excluded from state criminal trials, regardless of state rules concerning the admissibility of reliable confessions. *Mapp* held that unconstitutionally seized evidence should be excluded, regardless of state rules on admissibility. Therefore, *Mapp*

90. For example, during the last term of the United States Supreme Court it was faced with the necessity of ruling on the voluntariness of confessions in two federal criminal cases. In each case the *McNabb-Mallory* rule did not apply. Wong Sun v. United States, 371 U.S. 471 (1963); Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963). See also United States v. Carignan, 342 U.S. 36 (1951). Also, in any case where there is a necessary delay in arraignment, either voluntary or involuntary confessions may be produced, depending upon the defendant's state of mind.

91. *Cf.* pp. 447-53 *infra*, especially text accompanying note 142.

92. 367 U.S. at 655-57.

93. "Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. . . . This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights . . . not to be convicted by use of coerced confession, however logically relevant it be, and without regard to its reliability. . . . Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.?" *Id.* at 656. See also note 114 *infra*.

took a step in search and seizure law which had been taken long before in regard to confessions. If the Court had believed that the *Mapp* rationale required such a change in the use of confessions, it had an opportunity to indicate this on the same decision day when it also handed down *Culombe v. Connecticut*.[94] Instead, in *Culombe*, it expressly disclaimed any intention of imposing *McNabb-Mallory* on the states.[95]

The first argument, based upon the rationale that the Court is proscribing any evidence obtained in violation of state law, is almost a straw man. It has no relation to the *Mapp* holding. The purpose of the exclusionary rule in *Mapp* is to protect the individual's federal constitutional rights,[96] not to enforce state laws, nor even to preserve the integrity of state courts.[97] To make state statutory law controlling in this area would be a remarkable departure from constitutional doctrine and could hardly be relied upon to protect individual rights. Many states have laws which allow the police to detain the accused for one to three days after arrest before they must bring him before a magistrate.[98] These periods could of course be extended. Thus, any extension of *McNabb-Mallory* to the states must be based on the protection of a primary due process right, such as a supposed right to a prompt arraigument, not upon any present statutory illegality of detentions, for that illegality could disappear overnight.[99] To clarify the constitutional problems involved, the discussion below will assume that the states have all enacted a statute permitting detention of an

94. 367 U.S. 568 (1961).

95. "The *McNabb* case was an innovation which derived from our concern and responsibility for fair modes of criminal proceeding in the federal courts. . . . And although we adhere nnreservedly to *McNabb* for federal criminal cases, we have not extended its rule to state prosecutions as a requirement of the Fourteenth Amendment." *Id.* at 600-01.

96. "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." Mapp v. Ohio, 367 U.S. 643, 655 (1961).

97. Compare the rationale of *McNabb* as stated in Hogan & Snee, *supra* note 83.

98. See, *e.g.*, CAL. PEN. CODE § 825 (Deering 1959); DEL. CODE ANN., tit. 11, § 1911 (1953); HAWAII REV. LAWS §§ 255-9 (1955); N.H. REV. STAT. ANN. § 594:23 (1955); R.I. GEN. LAWS ANN. § 12-7-13 (1956). See also Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942), and the comments thereon in Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L., C. & P.S. 402 (1960); Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16 (1957).

99. There is, of course, the possibility that the state statutes requiring prompt arraignment would not be changed. That would be up to the legislatures, and cannot be predicted. On the one hand, one can ask why these statutes have not been previously repealed. But the rebuttal to such an argument is the fact that the *McNabb-Mallory* rule has not been enacted into legislation. Certainly, police pressure for amendment of the present state laws would increase drastically if the exclusionary rule were a necessary corollary to any violation of those laws.

arrestee for a specific number of hours before arraignment.

The problem with the second argument, based upon a due process right to a prompt arraignment, is that probably no such right exists. At least the United States Supreme Court has never enunciated such a right. No such enunciation could come out of its decisions in cases involving confessions used in state courts, because there the Court has been seeking the state of mind of the defendant. It has not based its decisions upon any single police tactic, but upon the "totality of circumstances" and their effect upon the defendant.[100] Nor do the confession cases arising in federal courts establish such a right under the fourth amendment[101]—the *McNabb* rule was born of the Court's inherent power to formulate "rules of evidence to be applied in federal criminal prosecutions,"[102] and arose from a federal statute,[103] not from a constitutional source.[104] Thus any enunciation of a due process right to a prompt arraignment must come from a source outside the confession cases, either state or federal.[105]

One such source[106] is the cases involving unconstitutional arrest.

100. In the last confession case of the 1962-1963 term, a four-day detention (in violation of a state anti-incommunicado detention statute) was held to be only an "attendant circumstance" to consider in determining involuntariness. Haynes v. Washington, *supra* note 75, at 517. The violation is mentioned only in a footnote, and is used primarily to buttress the Court's belief that the defendant's "version of what happened earlier" is true. *Id.* at 511 n.8. Thus, the fourteenth amendment confession cases show no tendency to establish a due process right to a prompt arraignment.

101. Hogan & Suee, *supra* note 83. If there is no such right under the fourth amendment, then a fortiori there is no right under the fourteenth.

102. McNabb v. United States, *supra* note 80, at 341.

103. The Court cited both 18 U.S.C. § 595 and 48 Stat. 1008 (1934). The requirement now arises from FED. R. CRIM. P. 5*a*.

104. Nor does Mallory, *supra* note 81, adopt a constitutional basis. It involved a technical construction of statutory wording. And in the *Mapp* decision itself, the *McNabb-Mallory* rule is expressly denominated an evidentiary one. Mapp v. Ohio, *supra* note 96, at 650.

105. *Cf.* Broeder, *supra* note 85, at 42 NEB. L. REV. 572-73. However this argument seems based on a misreading of a footnote in Wong Sun v. United States, 371 U.S. 471, 486 n.12 (1963). The Court there cites Hogan & Snee, *supra* note 83, for the proposition that *McNabb-Mallory* is capable of excluding both voluntary and involuntary confessions. The passage cited does stand for such a proposition, because it states that the rule offers greater protection to defendants against use of interrogation than does the more restricted involuntariness standard. This does not necessarily mean that the Court now regards *McNabb-Mallory* as a due process requirement.

106. A second source is *The Civil Rights Act Cases,* and in particular *Williams* v. *United States,* 341 U.S. 97 (1951). In *Williams* the Court upheld the conviction under the Civil Rights Act of a man who had, under color of state law, beaten confessions out of several suspects during an investigation. The Court never determined whether or not the confessions were ever used as evidence. See Allen, *supra* note 72, at 22-23. Therefore, this decision cannot be explained by the combination fair trial and state of mind rationale of the confession cases. Instead, this case must stand for the proposition that a person has some due process rights during interrogation which do not depend upon the later use of any confession. But the Court was quite careful to limit strictly the ambit of such rights. It stated that the right involved was one to be free *"from the use of force and violence to obtain a confession."* 341 U.S. at

The argument is that, if due process protects the individual's right of privacy against unconstitutional arrests, then "a fortiori"[107] it must also protect against delayed arraignments, because the latter constitute even greater invasions of one's privacy. This argument, however, ignores some basic differences between the two situations. The application of the *McNabb-Mallory* rule has never depended upon

102-03. It is true that strict construction was required because a criminal statute was involved, but it is still a very long legal journey from holding that an individual has a right not to be beaten to pronouncing a right to a prompt arraignment. Further, as will be shown below, the purposes behind each right would not be similar. At least it can be said that *The Civil Rights Act Cases* do not now offer any support for the establishment of the latter right.

107. The argument is made by Broeder, *supra* note 85, 42 NEB. L. REV. at 570. The full argument runs as follows: (1) *Wong Sun* extends the *Weeks* doctrine and holds that evidence which is the fruit of an unconstitutional arrest is inadmissible in a federal criminal trial. This exclusionary rule extends to declarations of the arrestee, whether voluntary or not. (2) *Mapp* excludes all evidence seized in violation of the fourth amendment, so that all evidence which is the fruit of an unconstitutional arrest is inadmissible. (3) If the fruits of an unconstitutional arrest are excluded, fruits of an "illegal detention" must "a fortiori" be excluded, because the latter is an even greater invasion of one's right to privacy.

Exceptions may be taken to each of these reasoning steps, but the major objection is to the last step. This objection is discussed in the text above. As to the first step, see the discussion in the text accompanying note 142 *infra*. In *Wong Sun*, the Court held inadmissible the fruit of an illegal *arrest and search*. Thus, the *Weeks* doctrine may be unchanged. It also emphasized the "oppressive circumstances" of the defendant's position, which made it impossible for his statement to be "an act of free will." 371 U.S. at 486. Such language has traditionally been used in the confession cases to denote involuntary confessions, but does not apply to voluntary statements. See notes 52-53 *supra*; Prescoe v. Maryland, 231 Md. 486, 191 A.2d 226 (1963); Broeder, *supra* note 85, 42 NEB. L. REV. at 523-24; *cf.* Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962). The argnments pro and con are outlined by Kamisar, *supra* note 85. Therefore the voluntariness of the statements may still determine their admissibility.

The extension of any "fruits" doctrine to voluntary statements is even more difficult when other rules, less mechanical, are available to protect the accused's rights, and when the extension is to be made under the due process concept. The rationale of the *Mapp* rule depends upon the necessity of effectively protecting the right to privacy and the failure of all alternative remedies. Mapp v. Ohio, 367 U.S. 643, 652, 655 (1961). Protection against unconstitutional procurement of confessions through unreasonable arrests is available from two sources—the involuntary confession rule and the "fruits" doctrine. And the Court does not feel that the involuntary confession rule is ineffective. In *Mapp*, it stated exactly the contrary. 367 U.S. at 656, quoted at note 82 *supra*.

But the Court, in an illegal search and seizure case decided last year, has applied the "fruits" doctrine to statements without considering whether those statements were voluntary. Fahy v. Connecticut, 375 U.S. 85 (1963). Whether that decision portends that the "fruits" doctrine will be used to determine admissibility in all situations, rather than the voluntariness of statements, only the future can tell. If the Court deliberately chose not to consider the voluntariness of the confession, the fruits doctrine applies at least in cases involving illegal searches and seizures. Such a decision would still not require use of the fruits doctrine in illegal arrest cases. And, even if the Court decides to employ the fruits doctrine in illegal arrest cases, the voluntariness standard should still determine the admissibility of confessions whenever the arrest is upon probable cause.

the illegality or unconstitutionality of the accused's arrest. Even if an illegal arrest is an unconstitutional seizure of the person, it does not necessarily follow that a detention for a limited time, when permitted by state statute,[108] and following a legal arrest is also such an unconstitutional seizure. The fact that the police may not interfere with one's movements without probable cause does not, in and of itself, impose limits upon their interference with the activities of an arrestee once probable cause is present. The arrestee's privacy has already been invaded at the time of arrest, and rightfully so if the arrest was upon probable cause. The interference caused by delay in arraignment is with the arrestee's right to bail and his ability to consult counsel. But bail and counsel are not being denied, they are being delayed. Therefore the question is not whether the police have a right to violate one's privacy without probable cause, but whether the presence of probable cause permits the police not only to interfere initially with a person's privacy by arresting him, but also to interrupt temporarily his ability to procure bail and consult an attorney.

At least two lines of cases permit the police to do so. The confession cases twice expressly rejected the argument that denial of access to counsel invalidates confessions per se and subsequently have regarded such a denial as only one criterion among the many to be considered in determining admissibility of confessions.[109] Also, the right to counsel cases do not seem to require counsel in the stationhouse. Those cases, based on the sixth amendment, are concerned with providing appointed attorneys to represent indigent defendants *during the trial itself*. They do not even require that counsel be provided in all proceedings in court. Counsel is not required at all arraignments, but only at those deemed "critical," which are those where technical pleas and motions must be made or are forever lost.[110] Thus, the objective sought by these cases seems to be to protect the defendant from losing his opportunity to present his defense through procedural and evidentiary technical rules, not to impede the investigation of crimes.[111] Until the proceedings reach the courts, these technicalities are not present. Thus, a due process right to a prompt

108. This was assumed at text following note 99 *supra*.

109. For further discussion see notes 39-41 *supra*.

110. Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59 (1963).

111. Anonymous Nos. 6 & 7 v. Baker, 360 U.S. 287 (1959). "[I]t would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney. Due process . . . demands no such rule." Crooker v. California, 357 U.S. 433, 441 (1958). "Even in *federal* prosecutions this Court has refrained from laying down any such *inflexible* rule." Cicenia v. LaGay, 357 U.S. 504, 509 (1958). (Emphasis added.) Nor does Massiah v. United States, 32 U.S.L. WEEK 4389, decided as this goes to press, hold contrary. That decision recognizes the difference between the investigative and later phases of a case, by limiting its holding to an *indicated* defendant.

arraignment cannot be found through cases involving illegal arrest or right to counsel, and in fact cannot be found at all. In processing persons legally arrested, the police have authority to interrogate, for it is a recognized and essential tool in protecting the other individuals in the community. They may use any voluntary confessions so obtained—that is, confessions obtained without violating the accused's right to refuse to disclose his guilt.

In the third argument for imposing *McNabb-Mallory* on the states, based on protecting the right to remain silent, the difference between use of the objective standard and the subjective state-of-mind test in the confession cases becomes crucial. The primary problem in making this third argument is in showing that *McNabb-Mallory* can effectively protect the right of nondisclosure. If that right is presently receiving insufficient protection, the Court has two alternatives. It may impose *McNabb-Mallory* on the states, or it may clarify and/or expand its present definition of "involuntary."

In determining the effectiveness of the *McNabb-Mallory* remedy, it becomes important to compare its purpose with the purpose of the right of non-disclosure. If they are not the same, *McNabb-Mallory* will hamper investigation where protection is not needed and will fail to offer protection where it is needed.[112] If the objective standard is the true explanation of the confession cases, these purposes could be said to be the same. Both *McNabb-Mallory* and the objective standard seek to control the conduct of the police. But since the Court is using a subjective test and seeking to ascertain the state of the defendant's mind, the purposes are different. *McNabb-Mallory* seeks to enforce a federal statute requiring an arraignment before a magistrate. On the other hand, the confession cases seek to protect the constitutional right to a fair trial by excluding unconstitutionally-obtained evidence, and to protect the individual from speaking under a prohibited state of mind. The latter is concerned with the type of evidence introduced during the trial; the former is concerned with the court procedures *leading to* the trial.

Of course an incidental benefit of *McNabb-Mallory* is that some coerced confessions are eliminated. But since the purpose of this rule is to effectuate a federal statute requiring arraignment, it can hardly be the most effective resolution of the competing individual and societal interests involved in protecting the right of non-disclosure. Thus, where the Court may choose between enforcing this right either by a mechanical rule absolutely prohibiting use of confessions obtained

112. As one of the advocates of stricter regulation of state police activities has well said: "The *McNabb* rule does stem from the Court's *greater control* over federal criminal justice, but it also deals with *lesser violations* than coerced confessions—mere breaches of the federal rules governing prompt commitment, as opposed to violations of the federal constitution." Kamisar, *supra* note 85, at 101.

during an unnecessary delay before arraignment, or by a more flexible rule which considers the total circumstances,[113] the latter course seems preferable.[114] *McNabb-Mallory* can never be more than a supplement to the present voluntariness standard, because of necessary delays in arraignment, and especially because of the possibility of post-arraignment interrogation.[115] On the other hand, since the police may question an accused reasonably,[116] that rule needlessly hampers allowable investigation.[117] Application of the rule depends in no way upon

113. Reck v. Pate, 367 U.S. 433, 443 (1961); Fikes v. Alabama, 352 U.S. 191, 197 (1957). The fact that the Court looks at the totality of circumstances does not necessarily mean that it bases its decisions on defense evidence which has been contradicted. *Cf.* Ritz, *Twenty-five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 WASH. & LEE L. REV. 35, 53-55, 66 (1962). It does mean, however, that the Court looks at many different facets of the interrogation and does not base its decision on any one action of the state police.

114. In making such a decision, *Mapp* and the search and seizure cases should be regarded as inapposite. The protection of most individual rights under the fourteenth amendment involves a balancing of interests—a comparison of the individual's interest in maintaining his freedom of action with the interest of society in maintaining peace and order in the community. See note 76 *supra*. The search and seizure cases stand as an abberation in this general pattern in that *Mapp* excludes all evidence resulting from any illegality in the search, whether serious or technical. Ker v. California, 374 U.S. 23 (1963). A prime example of the problem is Jones v. United States, 357 U.S. 493 (1958). This situation was, however, produced by a set of circumstances which is not present in the confession cases.

Two decisions, Wolf v. Colorado, 338 U.S. 25 (1949), and Irvine v. California, 347 U.S. 128 (1954), formed the pattern. *Wolf* laid down the absolute rule that the fourteenth amendment did not require evidence illegally seized to be excluded. *Irvine* made this rule absolute by making it applicable even where the police conduct was admittedly outrageous. Thus the Court, when presented with the task of making meaningful the fourteenth amendment guarantee of a right of privacy, could not easily use the balancing of interests rationale. Instead, it overruled one absolute rule with a second absolute rule. This about face was done in spite of the fact that many of the arguments in *Mapp* are more applicable to the overthrow of *Irvine* than of *Wolf*. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 29, 32. See also Allen, *supra* note 72, at 29.

However, the Court has not placed itself in such a predicament in deciding confession cases. The best analogy to *Irvine* in this area would have been Chambers v. Florida, 309 U.S. 227 (1940), if it had been decided the other way and had upheld the convictions. Under such a decision, psychological pressure alone would not have been sufficient to require exclusion of confessions. This, and later decisions in which evidence of physical coercion was conflicting, would have required the imposition of a mechanical rule, such as *McNabb-Mallory*, to protect the accused against possible police brutality. But the Court decided in *Chambers* to exclude evidence procured by psychological as well as physical coercion, so the analogy does not apply, and the analogous need for a mechanical rule is not present.

115. See discussion at notes 87-90 *supra*.

116. See discussion at notes 75-78 *supra*.

117. For a police chief's reaction to the effect of *McNabb-Mallory* on his work see U.S. News & World Report, Oct. 23, 1963, p. 92.

There is also an additional and hidden cost in using an exclusionary rule which is not exactly adapted to the objective sought. The courts may distort the concept of arrest to delay its occurrence. Examples of this may be seen in the federal cases. See United States v. Vita, 294 F.2d 524, 528 (2d Cir. 1961). And see Barrett, *supra* note 76.

the accused's state of mind, but only upon when the questioning occurs. Nor is the fact that the defendant is under arrest when questioned reliable evidence of the prohibited state of mind.[118] The Court has recognized that questioning after arrest will not necessarily coerce confessions from intelligent adnlts, especially from those who are experienced in crime, are educated in the law, or have previously consulted attorneys.[119] Also it wonld easily be possible for the police to record all questioning during such a delay and to show thereby the voluntariness of the confession.[120] This disregard of the accused's probable state of mind is undoubtedly why the Court has never made *McNabb-Mallory* a constitutional requirement, but has instead quite properly concentrated on enforcing the voluntariness standard.

The previous discussion does not mean that it is impossible for the Court to impose *McNabb-Mallory* on the states. As can be seen, there are many arguments for such a decision and they have been stated effectively many times.[121] The discussion herein has been based on the assumption that there would be effective state judicial control over police interrogation and arrest tactics. If there is no such control, these arguments become progressively less forceful. It then becomes the duty of the federal courts to exercise such control—an enormous administrative task. If extensive federal supervision is required, imposition of *McNabb-Mallory* on the states may be necessary to any effective supervision, because of its relative ease of administration. To ascertain whether such control is needed, we must ask: How well are the states applying the present standard? To answer that question, we must first determine what methods of analysis should be used in applying this definition of involuntary.

C. *A Suggested Method of Analysis*

If the police may interrogate the accused, but are held to a higher standard than merely refraining from uncivilized conduct, what is the present standard? What is the prohibited state of mind? Both the language and the rulings of the Court offer clues. The Court has often described the prohibited state of mind as one in which "the defendant's will was overborne", or where his statements were not "the

118. See, *e.g.*, Bram v. United States, 168 U.S. 532 (1897). But the best authority for such a statement is United States v. Mitchell, 322 U.S. 65 (1944), where statements made after arrest were held admissible even under the *McNabb* rule.

119. Cicenia v. LaGay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958); Thomas v. Arizona, 356 U.S. 390 (1958); Stein v. New York, 346 U.S. 156 (1953); Lisenba v. California, 314 U.S. 219 (1941).

120. For an example of the use of this technique see People v. Kendrick, 14 Cal. Rptr. 13, 363 P.2d 13 (1961). See also the discussion of such controls by Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, in POLICE POWER AND INDIVIDUAL FREEDOM 179-81 (Sowle ed. 1962).

121. See authorities cited at note 85 *supra*.

expression of free choice."[122] It has further stated that the defendant's will is overborne when "further resistance [in denying guilt] seem[s] useless" to him.[123] This indicates not only that the police may use psychological pressure tactics to induce an admissible confession, but also that a fairly high degree of pressure may be applied before the Court will term the confession "involuntary." The rulings of the Court buttress such a conclusion. It has held that the use of certain psychological pressure tactics for a limited time does not require the exclusion of resulting confession. The police may illegally detain the accused, fail to warn him of his rights, or deny him access to counsel without necessarily overbearing his will.[124] Each of these is a tactic which places greater pressure on the accused than the mere asking of questions. But the Court believes that they are not sufficient to cause a normal person to feel that further resistance to the interrogation is useless, because most men have some ability to remain silent in the face of routine questioning.[125]

Thus it seems possible at least to set a minimum limit on interrogation pressure so that use of less pressure will usually result in an admissible confession. The police may question the accused and use some pressure tactics for at least a limited period of time and still obtain a voluntary confession. On the other hand, it may be possible to set a maximum limit on interrogation pressure so that use of more intensive tactics will usually remove any response from the category of "voluntary conduct" and require exclusion of that response. The Court has recently reversed three convictions when the period of incommunicado detention was four to five days.[126] In each case the Court found other circumstances which intensified the coerciveness of such detention,[127] but these cases may indicate some limit on police

122. Haynes v. Washington, 373 U.S. 503, 513 (1963); Lynumn v. Illinois, 372 U.S. 528, 534 (1963); Reck v. Pate, 367 U.S. 433, 440 (1961); Watts v. Indiana, 338 U.S. 49, 53 (1949).

123. Reck v. Pate, *supra* note 122, at 444. "A confession by which life becomes forfeit must be the product of free choice. . . . But if it is the product of *sustained* pressure by the police it does not issue from a free choice." Watts v. Indiana, *supra* note 122, at 53 (1949). (Emphasis added.)

124. See authorities cited at note 119 *supra*. See also the language from *Gallegos v. Colorado* quoted at note 43 *supra*.

125. Such an assumption is necessary, for otherwise all actions could be termed involuntary. Contract law provides an analogous problem in defining duress, for all "consent" to contract is in a sense coerced. A seller refuses to make a gift of his goods and thereby "coerces" a buyer into paying by making payment the only way to get the goods, when buyer would much prefer to get the goods *and keep* his money. For a discussion of the problem in the contract context, see Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943). See also Dalzell, *Duress by Economic Pressure*, 20 N.C.L. REV. 237, 341 (1942), and notes 30 *supra* and 151 *infra*.

126. Haynes v. Washington, 373 U.S. 503 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Reck v. Pate, *supra* note 122.

127. In *Reck* and *Gallegos* the Court relied heavily on the type of defendant in-

conduct, at which point the record will be thoroughly examined for any other indicia of coercion.[128] On the other hand, the amount of pressure allowable may be much less; the Court has not indicated. Either way, some method must be developed to analyze cases which fall between the maximum and minimum limits set forth above, for they include the vast majority of the cases before the courts.

One method of deciding these cases is to list criteria and to try to color-match the factual situations of cases. This theory has been used by many state courts.[129] It is quite easy to list many interrogation practices the Court does not like.[130] Such a list is useless, however, in determining an individual case. No one criterion on the list may be relied upon to decide the question of voluntariness, for the Court considers the total circumstances. If several different tactics have been used, the list does not evaluate their individual importance or show any way of interrelating them or evaluating the effect of the combination.

The limited usefulness of such lists is due to their overconcern with objective criteria. Such concern would be well-founded if the Court were using an objective standard. Then one could list the police tactics, measure them against some ideal standard, and decide whether the conduct was outrageous. But the Court is not using an objective standard, it is ascertaining states of mind; so lists of objective criteria will never give a complete analysis of its decisions. A more useful method of analyzing these cases would start with a prohibited state of mind and consider how it may be produced. Such an analysis should allow some meaningful interrelation of the effect of the use of several interrogation practices.[131]

The following discussion, showing a method of analysis based on one significant mental condition, is not intended to be an exhaustive

volved. In *Haynes* the Court found the use of threats and inducements—the authorities refused to allow the defendant to call his wife until he was "booked," which meant by implication only after he had confessed.

128. It can hardly be said that such a limit is over-restrictive of police conduct. But Professor Inbau argues only for the necessity of an interrogation period "of perhaps several hours." Inbau, *Restrictions in the Law of Interrogation and Confessions*, 52 Nw. U.L. Rev. 77, 80 (1957). Policemen who desire authority for longer incommunicado detention would seem to have a very low regard for individual liberty.

129. See note 165 *infra*. This method was expressly disapproved by the Court in Reck v. Pate, *supra* note 122, at 442.

130. One such list is contained in Note, 33 Neb. L. Rev. 507, 508 (1953). See also Comment, 1954 Wash. U.L.Q. 82 n.9. Such a list might also be derived from this article from the textual discussion following note 131 *infra*, but it would probably not be as complete as those cited.

131. Any such analysis must consider objective facts, such as the length of questioning. This is because the Court is not determining the actual state of mind of the defendant, but a presumptive state of mind from these objective facts. See text at notes 45-50 *supra*. Use of such facts should not, however, be confused with use of an objective standard.

consideration of the types of situations which arise during interrogation. It is but a lengthy illustration of the way in which the many variations of one of the basic situations should be approached. Nor will it attempt to ascertain quantitative data—for example, the limit on the number of days an accused may be illegally detained—but will only try to find meaningful ways of interrelating different interrogation tactics.

One state of mind cited by the police as helping to induce an accused to confess is fear or anxiety.[132] The courts also recognized this point at an early date, and the common law excluded confessions caused by fear through the use of threats or brutality.[133] Yet recognition of fear or anxiety as a state of mind which invalidates confessions has been severely limited. Many courts have thought that *only* threats or violence (brutality) could create a sufficiently adverse state of mind to require the exclusion of a confession.[134] Such an outlook may be valid if only untrue confessions are excluded. Thus, it might be said that only beatings or threats could induce sufficient fear in an accused to cause him to make a false confession. But it cannot be said that these are the only methods which can induce sufficient fear or anxiety to cause him to make a true confession against his will, which is equally objectionable under the Court's present standard.

For instance, fear that the police will hold him in custody until he confesses is quite likely to compel an accused to confess. He may conclude that further silence is useless, on the assumption that confession is the only way to end such custody. This fear may arise from express threats by the police; or it may be inferred by the accused if the police detain him for a long time, during which a confession is sought, and make no indication that they will release him without a confession—such an inference would certainly be reasonable. And any confession caused by fear for his liberty if he persists in refusing to confess violates his right of nondisclosure.[135]

It would be impossible, however, to discover how long a detention must be in order that the accused will be presumed[136] to make such an

132. INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION 151-56 (3d ed. 1953); MAGUIRE, EVIDENCE OF GUILT 109 (1959); O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 108 (1956).

133. Brown v. Mississippi, 297 U.S. 278 (1936); The King v. Warickshall, 1 Leach 263, 168 Eng. Rep. 234 (K.B. 1783). See also 3 WIGMORE, EVIDENCE § 825 (3d ed. 1940).

134. See notes 166-70 *infra*.

135. Although Haynes v. Washington, *supra* note 122, involved express threats of continued incommunicado detention, some of the Court's language is instructive: "[E]ven apart from the express threat, the basic techniques present here—the secret and incommunicado detention and interrogation—are devices adapted and used to extort confessions from subjects." *Id.* at 514. See also State v. Archer, 244 Iowa 1045, 58 N.W.2d 44 (1953).

136. See text accompanying notes 45-50 *supra*.

inference, for any such decision must depend upon many other factors, such as the method of questioning, the type of detention, and the type of person the accused is. If the questioning is long, continuous, or persistent,[137] the interrogator is obviously hostile,[138] great numbers of police are present,[139] or arms are obviously carried,[140] anxiety will be induced much more quickly than if such interrogation methods are not used. Thus the length of interrogation which will make an accused become so fearful that his will is overborne will vary according to the presence of any one of several factors. With so many independent variables, it would be illusory to try to specify any set length of interrogation as oppressive.

Courts must consider not only interrogation methods practiced as outlined above, but also the type of detention employed. The use of either illegal[141] or incommunicado detention may be considered to increase oppressiveness. However, these factors should not be evaluated on the basis of their objectionableness to society or deviation from an ideal standard of police conduct, but rather on the basis of their probable effect on the accused and his ability to refuse to disclose his guilt or assert his innocence. Thus any illegality of detention should not be considered relevant to a determination of "voluntariness"

137. Such questioning not only establishes an oppressive atmosphere which frightens the accused, but also causes him to believe that confession is the only way out of the station house. State v. Archer, *supra* note 135. Repeatedly asking the same question without regard to the accused's answers soon implies that the previous answers are not acceptable and that only one kind of answer will satisfy the police. Such an anxiety-producing effect is in addition to any exhaustion of the defendant caused by such tactics. *Cf.* Ralph v. State, 226 Md. 480, 174 A.2d 163 (1961).

Even the police manuals agree that persistent questioning will allow the interrogator to "dominate his subject": "[w]here emotional appeals and tricks are employed to no avail [the investigator] must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable." O'HARA, *op. cit. supra* note 132, at 112.

138. State v. Floyd, 223 S.C. 413, 76 S.E.2d 291 (1953). See also authorities cited at note 132 *supra*. *But see* Downey v. People, 121 Colo. 307, 215 P.2d 892 (1950). On the other hand, there is a greater danger that soft or neutral questioning can be interpreted as a promise of benefit for confessing.

139. Chambers v. Florida, 309 U.S. 227 (1940). *Cf.* State v. Solomon, 222 La. 269, 282, 62 So. 2d 481, 485 (1952) (that there were twenty-seven interrogators held irrelevant).

140. See People v. Price, 24 Ill. 2d 46, 57, 179 N.E.2d 685, 691 (1962); *cf.* State v. Worthy, 239 S.C. 449, 123 S.E.2d 835 (1962).

141. Such illegality may be caused by violation of a prompt arraignment statute, or by use of a sham loitering or vagrancy charge. For a discussion of the incidence of the use of loitering and vagrancy charges as illegal detention tools, see Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 20-27 (1957).

unless the accused is aware of that illegality. Only then can it be said to affect his state of mind and induce greater anxiety than would a legal detention.[142] Incommunicado detention, on the other hand, is a much more important consideration. Almost certainly the accused will realize that he is not permitted to communicate with the outside world, and this will increase his anxiety more than the mere fact of being detained. This, in turn, reduces the length of detention required for the accused to reach the prohibited state of mind in which the police dominate him.[143]

Each of these fact patterns must also be evaluated on the basis of the type of defendant involved and his probable ability to resist interrogation. For example, a greater length of detention may be required to frighten an accused who knows his rights, such as an educated adult or an experienced criminal.[144] But other abuses, such as unlawful or secret processing, may take on greater significance for them than for others.[145] Hostile questioning may easily frighten members of minority groups,[146] but may put the educated adult on guard against the interrogator.[147] Extremely youthful arrestees may become excessively disturbed by separation from their families; and a meaningful warning as to their rights, one which will enable them to appreciate the effect of those rights on their situation, would then become especially important.[148]

The central idea, however, of the suggested method of analysis

142. State v. Traub, 150 Conn. 169, 187 A.2d 230 (1962); State v. Higdeon, 356 Mo. 1058, 204 S.W.2d 754 (1947); Collins v. State, 171 Tex. Crim. 585, 352 S.W.2d 841 (1961). See also People v. Weinstein, 11 N.Y.2d 1098, 184 N.E.2d 312, 230 N.Y.S.2d 721 (1962).

This line of reasoning, however, may be foreclosed by the Supreme Court under the "fruits" doctrine. See the discussion of *Fahy v. Connecticut* at note 107 *supra*. Such a holding would be outside the voluntariness standard, and should not be regarded as affecting in any way analysis under that standard.

143. Haynes v. Washington, *supra* note 122. Incommunicado detention increases anxiety in two ways: (1) It makes it more difficult to procure aid, and thereby to obtain one's release. (2) The accused knows that his unexplained disappearance causes his family to worry and takes away their source of financial support.

144. Stein v. New York, *supra* note 119; Crooker v. California, *supra* note 119.

145. See authorities cited in note 142 *supra*.

146. *Cf.* State v. Worthy, *supra* note 140.

147. INBAU & REID, *op. cit. supra* note 132, at 179.

148. Gallegos v. Colorado, 370 U.S. 49 (1963); People v. Nemko, 23 Ill. App. 2d 591, 179 N.E.2d 825 (1962). Warning the accused of his right to counsel and his right to remain silent will be helpful only if the meaning of those rights is clear to him. Thus the police would not only have to state the warnings meaningfully, but would also have to enable the accused to appreciate their effect upon his situation. If he can not appreciate their effect, no amount of pious pronouncement of the proper words can lessen the effect of the detention upon his state of mind. Fikes v. Alabama, 352 U.S. 191, 193 (1957); Haley v. Ohio, 332 U.S. 596, 601 (1948); United States v. Haupt, 136 F.2d 661, 670 (7th Cir. 1943); *cf.* United States v. Grote, 140 F.2d 413 (2d Cir. 1944); State v. Rideau, 242 La. 431, 137 So. 2d 283 (1962).

is that each of these factors is relevant only insofar as it affects the defendant's probable state of mind. Since anxiety increases more rapidly when aggravating factors are present, their use will reduce the length of detention required to overbear the defendant's will to remain silent.[149] The fact that the aggravating factor may also have been improper police conduct, or a violation of a statutory command, does not necessarily mean that the resulting confession was involuntary. Nor should the issue of involuntariness be dependent upon the violation of other constitutional rights, unless the defendant knew his rights were being violated and thereby became more fearful of still further abuses of his rights.

D. *Summary*

All of the foregoing considerations should illustrate the impossibility of setting forth any specific, or litmus paper test,[150] definition of "involuntary." For example, one cannot say that any certain length of detention, legal or otherwise, is a dividing line between voluntary and involuntary confessions. However, this does not mean that nothing can be done in regard to defining this term. A definition can be approached by setting forth: (1) interrogation procedure which probably cannot be held to cause an accused to make an involuntary confession; (2) interrogation procedure which will usually require the exclusion of any resulting confession; and (3) a method of analyzing situations which fall between these probable limits.

In considering any problem in this area, the primary concern must be the probable state of mind of the accused. The question is whether he thought that further resistance to the interrogator's insistence that he confess was useless. Thus the interrogation pressures must overbear his will to refuse to disclose his guilt. Neither questioning of the accused after arrest nor minimal use of pressure tactics is deemed to overbear his will. The police may, therefore, illegally detain the accused for a limited time, fail to warn him of his rights, prevent him from contacting his attorney, and secretly question him, all without automatically producing an involuntary confession. The Court realizes both that appropriately limited interrogation is an essential investigative tool and that most persons have enough mental fortitude to resist

149. On the other hand, detention during which aid and advice are available creates less anxiety, so that the coercive effect of the detention is comparatively less. In determining the effect of the interrogation tactics used, one must consider not only what the police have done to increase the oppressive atmosphere of the detention and interrogation, but also what the police did which relieved that atmosphere, such as warning the accused and permitting communication to his family and advice from counsel.

150. Culombe v. Connecticut, 367 U.S. 568, 601 (1961).

such interrogation for a limited time. After a few hours of such questioning, however, the accused's ability to resist these pressures may become more questionable, and the admissibility of any confession elicited less certain.

On the other hand, the Court seems to consider incommunicado detention for four or five days, with the usual attendant practices, sufficiently distressing to require the exclusion of most confessions resulting therefrom. Exceptions might be made for the experienced criminal or the trained lawyer, but probably few others have sufficient knowledge and presence of mind not to conclude under such circumstances that confession is the only way out of the station house. Thus the probable effect of such tactics is to make any further refusal to confess seem useless to the accused, as not enhancing his chances of ending the detention, but only delaying that termination.

Most situations fall between these limits, however, and must be judged on a case by case basis. Even though it does not provide specific answers in this area, a definition of voluntariness based on a right of non-disclosure is helpful. It does provide a method of evaluating the combined effect of the many relevant facets of an interrogation. This is done by directing all efforts toward answering the question: What was the probable total effect of the interrogation on the accused's state of mind? After such treatment, would this type of person probably be able to refuse to disclose his guilt *and* believe that he could continue to do so throughout the remainder of the interrogation?

IV. STATE COURT DECISIONS

Certainly the state courts are capable of deciding such questions, so that the federal courts should not have to supervise their use of confessory evidence.[151] Nor is it a difficult problem to instruct juries on the basis of such an analysis. There is still a problem, however, as to whether the state courts are in fact adhering to the United States Supreme Court's present definition of "involuntary."

The Supreme Court has decided thirty-four state confession cases in the last twenty-seven years,[152] an average of slightly more than one case per year. The state supreme courts decide at least fifty such cases each year.[153] One would therefore presume that, with such a wealth

151. An analogous issue of voluntariness arises when a contract is attacked as having been procured under duress. Yet state courts have been determining this state of mind for almost a century. Young v. Hoagland, 212 Cal. 426, 298 Pac. 996 (1931); Barry v. Equitable Life Assur. Soc'y, 59 N.Y. 587, 591 (1875); Galusha v. Sherman, 105 Wis. 263, 81 N.W. 495 (1900). See also note 30 *supra;* authorities cited note 125 *supra.*

152. Haynes v. Washington, 373 U.S. 503, 525 (1963) (dissenting opinion).

153. A search of the West digests (under Key numbers Criminal Law 519 and

of experience in defining "involuntary," the state courts would have developed a viable definition.

In state criminal cases the admissibility of confessions is usually considered at three different times: by the trial judge, by the jury, and by the appellate courts.[154] First, the trial judge must decide whether the confession must be excluded as a matter of law. If this is not necessary, the jury next must consider both the legal and factual issues in determining voluntariness. The trial judge controls this consideration by his instructions to the jury on the point, and he should direct the jury to disregard the confession if they find that it was involuntarily given.[155] If the defendant is convicted, the appellate courts may be asked to review the use of the confession and again the issues are whether it should have been excluded as a matter of law,[156] and whether the instructions to the jury were correct.[157]

Thus the jury considers the voluntariness of the confession once, measuring voluntariness by the directions in the trial judge's instructions. Judges rule on the issue of voluntariness twice, but consider only whether the confession was inadmissible as a matter of law.[158] If the trial judge's instructions or the standards used by the judges in resolving the legal issue are either incorrect or obscure, the defendant's interests are not sufficiently protected. Any review of state cases will reveal both incorrectness and obscurity in both trial court instructions and appellate court standards.[159] Such a review will also reveal many cases in which both clear and correct standards have been applied.

As to trial court instructions, the jury will typically be told to dis-

Constitutional Law 266) for the last two years reveals approximately one hundred such decisions. Not all the confession cases are catalogued under either of these headings, however, as is shown by the omission of the leading California case on the subject, People v. Kendrick, *supra* note 120.

154. Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317 (1954). This arrangement is used in states adhering to either the "New York view" or the "Massachusetts view," which comprise the predominant number of courts. Under the "orthodox view," the jury is not consulted.

155. Rogers v. Richmond, 365 U.S. 534 (1961). If the only instruction to the jury is to disregard the confession if they find it untrustworthy, the instruction is reversible error. *Ibid.* Whether this decision requires abandoument of the "orthodox view" is still undecided.

156. See the discussion in Ritz, *Twenty-five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 WASH. & LEE L. REV. 35, 58-61 (1962), of the problems created by the *Stein* decision when this simple point was overlooked.

157. Rogers v. Richmond, *supra* note 155.

158. Ritz, *supra* note 156, at 57-58. Thus, all conflicting evidence as to the defendant's treatment during interrogation will be resolved in favor of the prosecution following a guilty verdict.

159. In the notes following, it should be noted that most citations are from the years 1961 through 1963. This is after the decisions in Reck v. Pate, 367 U.S. 433 (1961), Rogers v. Richmond, *supra* note 155, and Culombe v. Connecticut, 367 U.S. 568 (1961), which announced the Court's present standard.

regard a confession "if same was made under promise of reward, or was induced by threats, or was otherwise involuntary."[160] Such an instruction has two primary faults. First, it connects "involuntary" so closely to promises or threats that the jury may easily believe that this is the only way in which confessions may be coerced. This would mean that the defendant is being protected only by the common law untrustworthiness standard, and that his additional due process protection has been lost. Secondly, if "involuntary" is not so tied to promises and threats, the single word, standing alone, is probably not sufficiently meaningful to the jury. Substantial explanation of this concept would seem imperative if this is a major argument in the defendant's case. Nor can the state courts maintain that there has been no such explanation available, for the Supreme Court has considered and seemingly approved an instruction which further defined the concept:

> The trial court charged the jury that it could not consider a confession unless it was voluntary; that the jury was the sole judge of voluntariness; and that a confession was not voluntary when obtained by any kind of violence, abuse, or threat, or by "any coaxing, cajoling, or menacing influence which induces in the mind of the defendant the belief or hope that he will gain some advantage by making a confession."[161]

Other state courts have also formulated instructions which contained expanded definitions of involuntary.[162] This much explanation would seem to be the minimum requirement to allow jury determination to be a meaningful protection of the defendant. Still better would be an instruction which advised the jury of the nature of the right of nondisclosure, the constitutional interests protected by its promulgation,

160. *In re* Pate's Petition, 371 P.2d 500, 504 (Okla. Crim. 1962). Other examples include: "[T]he State must prove that [the confession] was freely and voluntarily made and that it was not obtained by force or by a promise or threat or inducement." Jones v. State, 229 Md. 165, 174, 182 A.2d 784, 788 (1962). "If you believe . . . that the said purported statement was not freely and voluntarily made . . . or that same was made as a result of coercion, compulsion or force . . . ." Collins v. State, *supra* note 142, at 846. A confession is admissible, "except when made under the influence of fear produced by threats." WASH. REV. CODE ANN. § 10.58.030 (1961), approved in State v. Thompson, 58 Wash. 2d 598, 607, 364 P.2d 527, 532 (1961), but disapproved in Haynes v. Washington, 373 U.S. 503 (1963). Nor has the sole use of the untrustworthiness standard disappeared from instructions: "Was the inducement held out to the accused such as that there is any fair risk of a false confession?" State v. Nelson, 139 Mont. 180, 362 P.2d 224 (1961). See also State v. Cross, 357 S.W.2d 125 (Mo. 1962).

161. Stroble v. California, 343 U.S. 181, 189 (1952).

162. See, *e.g.*, State v. Jones, 253 Iowa 829, 835, 113 N.W.2d 303, 307 (1962): "The trial court properly instructed the jury . . . the confession could not be considered by them unless they found beyond a reasonable doubt the statements contained in the alleged confession . . . were made by the defendant voluntarily uninfluenced by fear, deception, promise, or artifice."

and thereby explained the reasons behind their being asked to disregard reliable evidence.

The state appellate courts do review the admission of confessions into evidence, usually considering the facts surrounding the obtaining of these statements. Thus they do not rely entirely upon any jury decision as to voluntariness, but at least review the trial judge's decision to let the jury hear the confession.[163] In such review, the important question is: What standard is the court using to measure voluntariness? The answer to this question varies from state to state. Some state courts do seek to determine whether or not the defendant's will was overborne and base this determination upon his probable state of mind at the time he confessed.[164] Other state courts, however, give a very limited review of voluntariness problems, seeking only to determine whether the facts in the case before them are on all fours with the facts in any of the cases reversed by the United States Supreme Court. If the instant case does not "color-match" any of the Court's decisions, it is automatically affirmed.[165]

Even in those courts which do not color-match cases, appellate review may be extremely limited. The cases show three major types of such limitations. (1) Some state appellate courts still regard threats or promises as the only methods of obtaining involuntary confessions and disregard the coercive effect of any other tactics.[166] This outlook

163. *Cf.* State v. Harriott, 248 Iowa 25, 79 N.W.2d 332 (1956); State v. Ellis, 354 Mo. 998, 193 S.W.2d 31 (1946).

164. Kasinger v. State, 234 Ark. 788, 354 S.W.2d 718 (1962); State v. Traub, 150 Conn. 169, 187 A.2d 230 (1962); People v. Melquist, 26 Ill. 2d 22, 185 N.E.2d 825 (1962); State v. Fauntleroy, 36 N.J. 379, 177 A.2d 762 (1961). See also Hollman v. State, 361 S.W.2d 633 (Ark. 1962); Ebert v. State, 140 So. 2d 63 (Fla. 1962); State v. Archer, *supra* note 135; State v. Floyd, 223 S.C. 413, 76 S.E.2d 291 (1953).

165. Such an attitude may be shown by many different shades of language: "None of the [United States Supreme Court] cases cited have facts and circumstances on all fours with those in the present case and, in our opinion, they are not here controlling." Collins v. State, *supra* note 142, 352 S.W.2d 845. "There was no evidence of protracted questioning leading up to the making of the confession, nor the use of any high powered lights or similar devices . . . ." Rudolph v. State, 152 So. 2d 662, 665 (Ala. 1963). "In the instant case, the record does not demonstrate . . . that defendant was: held incommunicado for an extended period of time; questioned continuously and/or in relays; denied food or drink; critically deprived of his capacity for self-determination; or denied the presence and advice of counsel." State v. Keating, 61 Wash. 2d 452, 456, 378 P.2d 703, 705 (1963). Nor is the federal judiciary immune. "The facts in each [of several Supreme Court cases previously cited] are clearly distinguishable from the facts before this court." Smith v. Heard, 214 F. Supp. 909, 912 (S.D. Tex. 1962).

166. See, *e.g.*, State v. Lasby, 174 A.2d 323 (Del. 1961); Bauer v. Commonwealth, 364 S.W.2d 655 (Ky. 1963); State v. McAllister, 244 La. 42, 150 So. 2d 557 (1963); State v. Rideau, 242 La. 431, 137 So. 2d 233 (1961); State v. Cross, *supra* note 160. *Cf.* the following statement by a Texas court: "The facts . . . entitled the appellant, in addition to the submission of threats and duress, to a distinct submission of whether

gives the defendant only that protection which he had at common law, and denies him the due process protection added by the Court.[167] Under such reasoning, lack of warning, denial of counsel, failure to provide food,[168] and even compulsory stripping of the accused[169] have been held *irrelevant* to the issue of coercion. (2) The effect of extended detention and questioning on the accused's state of mind is also usually disregarded. Instead of examining the anxiety created by such tactics, the courts look only to the propriety of the police conduct.[170] (3) Many of these problems arise because of over-reliance

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the statement was made without compulsion or persuasion." Odis v. State, 171 Tex. Crim. 107, 109-10, 345 S.W.2d 529, 531 (1961).

167. See text following note 160 *supra*. In some cases the protection is even less than at common law, because of excessively restricted definitions of "threats." See, *e.g.*, People v. Stoner, 205 Cal. App. 2d 108, 22 Cal. Rptr. 718 (1962); Ralph v. State, 226 Md. 840, 174 A.2d 163 (1961). *But see* People v. Brommel, 56 Cal. App. 2d 629, 364 P.2d 845 (1961). In each case, compare Haynes v. Washington, 373 U.S. 503 (1963). But more especially, compare these decisions to Bram v. United States, 168 U.S. 532 (1897), and to the language therein quoted *from state court opinions*. *Id.* at 557-59. If any state police interrogator feels that the Court is now over-restrictive of his practices, he should read *Bram* once, and then ponder how he would practice his calling if the Court should return to that definition of "involuntary."

In other cases, common sense is ignored, and threats against persons other than the accused himself are held irrelevant. See, *e.g.*, People v. Kendrick, *supra* note 120; People v. Curley, 114 Cal. App. 2d 577, 250 P.2d 667 (1952); Jones v. State, 229 Md. 165, 182 A.2d 784 (1962); Pate v. State, 361 P.2d 1086 (Okla. Crim. 1961); State v. Keating, *supra* note 165; *cf.* People v. Trout, 54 Cal. 2d 576, 354 P.2d 231 (1960). But consider the problem facing the police when family or friends of the accused are suspected of being accessories after the fact. If they wish to prosecute the accessory charge, how may they investigate? See *In re* Pate's Petition, *supra* note 160; *cf.* People v. Band, 202 Cal. App. 2d 668, 21 Cal. Rptr. 89 (1962).

168. See, *e.g.*, Jones v. State, *supra* note 167; State v. Bridges, 349 S.W.2d 214 (Mo. 1961); State v. LaPierre, 39 N.J. 156, 188 A.2d 10 (1963); Commonwealth v. Graham, 408 Pa. 155, 182 A.2d 727 (1962); Lopez v. State, 172 Tex. Crim. 317, 366 S.W.2d 587 (1963); Fernandez v. State, 172 Tex. Crim. 68, 353 S.W.2d 434 (1962). These factors were held irrelevant because defendant had made no request for the item denied. Certainly such failures need not be determinative of the case, but they do have an impact on the accused's state of mind. See Haynes v. Washington, *supra* note 167.

169. Commonwealth v. Banmiller, 199 Pa. Super. 599, 187 A.2d 185 (1962). This factor was held irrelevant because it did not "shock the conscience" of the court.

170. Typical of such an outlook is the statement: "As to the questioning of defendant before arraignment, this is permissible in Delaware. . . . And even if the purpose of the questioning is to secure a statement, the test of admissibility remains whether or not there is a reasonable probability that it was obtained by *improper methods*." State v. Lasby, *supra* note 166, at 326. (Emphasis added.) This outlook allows courts to hold that twenty-seven days of illegal detention and interrogation have no causal connection to a confession made at the end of that time. Lopez v. State, 171 Tex. Crim. 552, 352 S.W.2d 106 (1961). Nor have twelve hours of continuous questioning. Bauer v. Commonwealth, *supra* note 166. Nor does the combined use of lengthy detention and continuous periods of interrogation receive greater recognition. See, *e.g.*, Dawson v. State, 139 So. 2d 408 (Fla. 1962) (seven day detention, four to eight hours of questioning per day). "[A] confession is not vitiated by the fact that it was made while in custody after interrogation, provided the questioning was *orderly and properly conducted*." *Id.* at 411. (Emphasis added.) See also Dennison v. State, 259 Ala. 424,

upon state-created safeguards which are not related to the Court's present standard. Individual states have created many express rules for determining the admissibility of confessions. These rules may be either more[171] or less[172] protective of a particular aspect of the accused's rights than the Court's standard, but they do not protect the same due process rights that the involuntariness standard does. Once such a rule has been developed, there is a pronounced tendency to rely upon that rule exclusively and disregard all other facets of the problem.[173] However, since the state safeguards do not seek to enforce the right to refuse to disclose guilt, they are insufficient when so used.

These self-imposed limitations on state appellate review do not

66 So. 2d 552 (1963). Yet it is obvious that such treatment affects the accused's state of mind, and therefore must be considered relevant. See note 135 *supra*.

171. See, *e.g.*, People v. Noble, 9 N.Y.2d 571, 175 N.E.2d 451, 226 N.Y.S.2d 404 (1961), where a refusal to answer an accused's questions as to his rights to remain silent and to consult counsel was held sufficient to require exclusion of the resulting confession. TEX. CODE CRIM. PROC. ANN. art. 727 (1941) requires that an arrestee be warned for his confession to be admissible. These safeguards do not supplant the due process requirement of excluding involuntary confessions, however, because they each look at only one facet of the treatment of the accused, not at the total circumstances affecting his state of mind. The rules of *McNabb* and *Massiah*, *supra* note 111, also fall into this category.

172. Some states provide rules which offer less protection than the common law did. One example is a statute which permits use of confessions obtained by certain kinds of threats or promises. IND. ANN. STAT. § 9-1607 (1956); WASH. REV. CODE ANN. § 10.58.030 (1961). *But see* Haynes v. Washington, 373 U.S. 503 (1963). Another device is to have the confession itself state that it is voluntary. See Britt v. State, 242 Ind. 606, 180 N.E.2d 235 (1962). *But see* Haley v. Ohio, 332 U.S. 596 (1948).

Still other rules find their potential protective ability reduced to insignificance by judicial construction. One example is Kentucky's "anti-sweating" statute, KY. REV. STAT. § 422.110 (1961), which prohibits the police from "obtaining information from the accused . . . by plying him with questions," and requires the exclusion of all confessions so obtained. After judicial construction, this language now offers little protection against being "plied with questions." "[I]t would have to be established that the confession was secured by threats, coercion or other wrongful means." Bauer v. Commonwealth, *supra* note 166. Thus twelve hours of continuous interrogation will not invalidate a confession. *Ibid.* Nor will detention for ten days. Reed v. Commonwealth, 312 Ky. 214, 226 S.W.2d 513 (1949). Whether or not such treatment is "wrongful," it does seem to constitute "plying with questions."

Another example is the adoption by the Michigan Supreme Court of the *McNabb-Mallory* rule for use in criminal trials in that state. The rule was subsequently modified, however, and perhaps negated. As presently construed, only confessions which have been *caused* by the illegal detention must be excluded. People v. Harper, 365 Mich. 494, 113 N.W.2d 808 (1962). Although this causal requirement has not yet been interpreted, the experience of other states is enlightening. For example, Texas has for many years had a rule identical to the latter formulation, without notably enhancing the protection of individuals against interrogation abuses. Thus, in Texas, there is "no causal connection" between twenty-seven days of illegal detention and a subsequent confession, and so the confession is admissible. Lopez v. State, *supra* note 170. Such a result hardly conforms to the spirit of *McNabb-Mallory*.

173. See notes 171-72 *supra*, and Ritz, *State Criminal Confession Cases: Subsequent Developments in Cases Reversed by the U.S. Supreme Court and Some Current Problems*, 19 WASH. & LEE L. REV. 202, 223 (1962); see also State v. Green, 221 La. 713, 60 So. 2d 208 (1952); compare LA. REV. STAT. ANN. § 15:452 (1950).

indicate that the state courts are actively refusing to grant to defendants the protection required by the Supreme Court. They do, however, show a misunderstanding of the Court's present standard and of the purposes behind the Court's decisions. Most of these limitations may be traced to an attempted use of the objective standard. Under it, only the conduct of the police need be considered, so attempted color-matching of cases becomes quite proper. Also, only "outrageous" or "uncivilized" police conduct is objectionable under that standard, so many coercive police tactics can be ignored, or at least condoned, if they have been in use for a long time. These limitations on state appellate review do not, therefore, mean that the state courts are unwilling to follow the decisions of the Supreme Court. They do mean that the Court's present position is not understood by the state courts. It is thus the Court's duty to make clear its present definition of "involuntary," primarily by explicitly stating the purpose it seeks to achieve and the interests of the individual accused it seeks to protect by excluding confessions.

V. CONCLUSION

Any definition of the term "involuntary" must be based on the purposes underlying the exclusion of involuntary confessions. At common law, the only reason for excluding confessions was to prevent the use of untrustworthy testimony. This rationale protects the accused only if the interrogation tactics are sufficiently coercive to induce a false self-accusation. The Supreme Court, however, has under due process granted the accused broader protection which does not depend on the untrustworthiness of the confession. The commentators have suggested that the purpose of this additional due process protection is to protect the accused from "outrageous" police conduct. But this is not so, for the Court has excluded convictions when the police conduct has not been outrageous; and in some cases evidence about the type of person making the confession is considered to be more important than evidence concerning police misconduct. Further, the Court has always characterized its determination of involuntariness as one involving an examination of the accused's state of mind. These actions of the Court indicate that it is using a subjective definition of "involuntary," and one which is based on protecting a due process right of even the "guilty" accused to refuse to disclose his guilt to a police interrogator. This right to remain silent is similar to, but not derived from, the fifth amendment privilege against self-incrimination. One was devised to protect against the ancient abuse of judicial inquisition, the other against the modern abuse of police interrogation.

The protection of an individual's right of non-disclosure does not, however, mean that the police may not question an arrestee to obtain information. Every man is supposed to have some ability to remain silent in the face of routine questioning. Nor is the fact that there have been violations of other due process rights reliable evidence of involuntariness. Thus the police may use the investigative tool of interrogation to a limited extent. They may question the accused, after arrest, and may even use some pressure tactics for a limited time to persuade him to confess. They may not, however, increase these pressures to the point that the accused, even if guilty, feels that they will insist upon a confession before easing the pressures. The question in each case is whether the accused's will to remain silent has been overcome by the interrogation. This is usually said to occur when further resistance to the interrogator seems unavailing. Whether this point has been reached or not must be decided on a case-by-case basis, because a probable state of mind is being determined.

The state courts are quite capable of deciding such issues at both the trial and the appellate court levels. However, their decisions in coerced confession cases show that many of them are not using the Court's present standard. In most instances, this can be traced to a misconception of the objective of the present rule. A clear explanation of that objective by the Court would enable the state courts to follow the present standard. There are special reasons for both the state courts and the state police to adhere to that standard. Continued failure to follow that standard will require greater federal court participation in such cases. It will also show that the present involuntariness rule used by some state courts cannot be relied upon to effectively protect the rights of accused persons in criminal trials. If the involuntariness rule does not provide effective protection, a stricter and more mechanical rule would be required. One such rule, the *McNabb-Mallory* rule, is available, as are arguments for its constitutional necessity.[174] But, because of *McNabb-Mallory's* inadequacies, this would be a poor resolution of the competing interests involved. Therefore, it is to be hoped that the states will not jeopardize their present limited authority to interrogate, but will restrict their use of confessions to those obtained without violation of the right to refuse to disclose guilt.

174. Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 564-94 (1963). See also text at notes 112-21.